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Kimmel, Short, McVay: Case Studies in Executive Authority,
Law and the Individual Rights of Military Commanders

by

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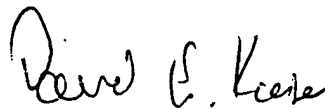
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Abstract

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I. Introduction

Two sets of controverted personnel actions frame U.S. involvement in the Second World War: the relief from command of Admiral Husband E. Kimmel and Lieutenant General Walter C. Short at Pearl Harbor, and the court-martial of Captain Charles B. McVay III, Commanding Officer of U.S.S. *Indianapolis* (CA 35), sunk by a Japanese submarine in July 1945. Vigorous controversy concerning the treatment of these commanders has continued to this day.

Kimmel and Short were the senior Navy and Army commanders at Pearl Harbor at the time of the Japanese attack on December 7, 1941. The Secretaries of the War and Navy Departments relieved both commanders within days of the attack. The relieved commanders reverted, by operation of law, to their regular grades of Rear Admiral and Major General. After reviewing a preliminary report on the damage at Pearl Harbor, prepared by Secretary of the Navy Frank Knox, President Roosevelt appointed an investigative commission headed by Justice Owen Roberts of the U.S. Supreme Court. The Roberts Commission found the senior Navy and Army commanders at Pearl Harbor culpable for lack of preparedness of forces assigned to them through failure to coordinate appropriately with each other in the defense of Pearl Harbor. Extensive correspondence and debate on the propriety of courts-martial followed. Both Kimmel and Short retired voluntarily in 1942, in their regular grades of Rear Admiral and Major General. A Navy Court of Inquiry and an Army investigative board recommended against court-martial charges, but endorsements of the service secretaries on these investigations continued to find fault with the judgment of Kimmel and Short. Kimmel agitated for a court-martial, which Secretary Forrestal finally offered him, but Kimmel declined upon advice of counsel. A Congressional investigation into Pearl Harbor conducted after the war, the record of which fills forty bound volumes, failed to vindicate Kimmel and Short. The Congressional investigation found Kimmel and Short culpable for multiple grave errors of judgment, including failure to use resources at their disposal effectively, and failure to coordinate with each other in their respective capacities.

Laws passed in 1947 and 1948 provided for advancement of certain officers on the retired list. Rear Admiral Kimmel and Major General Short were eligible for such advancement, but neither officer received the necessary endorsements. Advocates for Kimmel and Short point to failures in Washington as contributory to the defeat at Pearl Harbor and assert that failure to reveal and punish these failures entitles Kimmel and Short to posthumous advancement to their temporary grades of Admiral and Lieutenant General as a remedy for government discrimination against them.

Captain Charles B. McVay III was Commanding Officer of U.S.S. *Indianapolis* on July 30, 1945, when a Japanese submarine sank her, causing great loss of life. After delivering atomic bomb components from San Francisco to Tinian, *Indianapolis* sailed from Guam for Leyte, Philippines, on July 28, 1945. The intelligence provided to *Indianapolis* before her departure included reports of three possible submarine detections along her route. In transit, *Indianapolis* received a series of additional messages and monitored live radio traffic indicating real-time interdiction of a Japanese submarine along the route to Leyte. Fleet doctrine required ships to employ anti-submarine evasive maneuvering (zigzagging) in submarine waters during good visibility. On the evening of 29 July, at a time when visibility was poor, Captain McVay told the

Officer of the Deck that he could cease zigzagging at twilight. The ship ceased zigzagging at approximately 2000, but visibility improved later that night and *Indianapolis* did not resume zigzagging. Struck by at least two torpedoes near midnight, *Indianapolis* sank within fifteen minutes. Approximately 400 men went down with the ship, and 800 escaped into the water. Over the next four days, adrift on the ocean, 480 of the survivors were preyed upon by sharks or succumbed to their wounds or the elements.

The Commander in Chief, Pacific Fleet, Admiral Nimitz, convened a Court of Inquiry, which recommended that charges be referred against Captain McVay. The Chief of Naval Operations, Admiral King, concurred. After additional investigation and advice, the Secretary of the Navy referred charges for negligently hazarding a vessel (failure to zigzag) and dereliction of duty (delay in ordering abandon ship). A court-martial conducted at the Washington Navy Yard convicted Captain McVay of hazarding a vessel, and acquitted him of the dereliction charge. Consistent with the court-martial's recommendation of clemency, Secretary Forrestal set aside all punishment awarded. Captain McVay continued to serve on active duty until he retired as a Rear Admiral in 1949.

Controversy over Captain McVay's court-martial has also continued to this day. His son and numerous supporters have actively sought expungement of the court-martial. Several Congressmen have requested that the Navy reconsider the matter. Several books have accused the Navy of a "cover-up," using Captain McVay as a scapegoat. Orion Pictures recently purchased the rights to make a motion picture of Dan Kurzman's book on the *Indianapolis* tragedy, *Fatal Voyage*.

Many recent books and articles have intensified debate over the Pearl Harbor cases and the McVay case. Professional interest in these cases among senior officials, civilian and military, continues unabated. At stake are fundamental legal principles, many of them founded in the Constitution and in Supreme Court precedents concerning the discretionary authority of the service secretaries and the Commander in Chief. The Pearl Harbor cases and the McVay case provide excellent opportunities to delineate the contours of the enduring Constitutional principles of civilian control of the military, the separation of Congressional, Executive, and Judicial powers relating to military personnel actions, and the attenuation of individual rights in the military.

Key decisions of the President and the Secretaries of War and the Navy in the cases of Kimmel, Short and McVay were within the scope of Executive authority under the U.S. Constitution. Specific administrative and disciplinary actions taken against these military commanders complied fully with applicable substantive and procedural law. The President retains power to grant the relief sought by advocates for Kimmel, Short and McVay; however, those who advocate official action by the United States to rehabilitate these World War Two era commanders should recast their arguments as petitions for discretionary relief instead of claims of entitlement to remedies based on alleged violations of legal rights.

Overview: The Commander in Chief and the Military Milieu

The Commander in Chief

The Kimmel, Short and McVay cases raise questions about the relationship between Executive authority and the individual rights of military officers. The law applicable to the grievances alleged in these cases has generally resolved conflict between the authority of the President and individual interests in favor of the President, holding that the individual rights of service members are attenuated in a relationship of subordination to authority. This paper explores in detail numerous separate questions of rights and authority raised by the Kimmel, Short and McVay cases, but certain overarching principles warrant clarification at the outset.

Among the characteristics of Executive power that distinguish it from legislative and judicial functions are unity of action, energy, dispatch.¹ To preserve these values the Constitution vests all Executive authority in one individual, the President.² In the exercise of executive power the President competes with no other Executive Branch officer. In his role as Commander in Chief of the armed forces,³ the President acts in his most constitutionally defining capacity⁴ and the exclusivity of his powers is at its height.⁵ As Commander in Chief the President is not merely

¹E.g., THE FEDERALIST No. 70 (Alexander Hamilton)(Jacob E. Cooke ed., 1961); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 722-27 (reprint 1987)(1833).

²U.S. Const. art. 2, § 1 ("The executive Power shall be vested in a President of the United States of America.").

³U.S. Const. art. 2, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

⁴See THE FEDERALIST No. 74, at 500 (Alexander Hamilton)(Jacob E. Cooke ed., 1961)("Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of common strength; and the power of directing and employing the common strength, forms an usual and essential part of the definition of executive authority."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 768 (reprint 1987)(1833)(" . . . the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power. Even the coupling of the authority of an executive council with him, in the exercise of such powers, enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure. Timidity, indecision, obstinacy, and pride of opinion, must mingle in all such councils, and infuse a torpor and sluggishness, destructive of all military operations.").

⁵E.g., Department of the Navy v. Egan, 484 U.S. 518, 530 (1988)("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); Nordman v. Woodring, 28 F. Supp. 573, 576 (W.D. Okla. 1939)(Under the Commander in Chief Clause the President has "power to employ the Army and the Navy in a manner which he may deem most effectual."); GLENDON A. SCHUBERT, JR., THE PRESIDENCY IN THE COURTS 348 (1957)("When the President acts, literally, as Commander in Chief, his constitutional authority is on unimpeachable grounds."); CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 117 (1921)("[P]ractically all authorities agree that the President, as Commander-in-Chief, occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments.").

a policy maker; he enjoys the power of actual command of the armed forces, as "first General and Admiral."⁶ At his option, regardless of his experience or skills, the President may assume direct, personal command of forces in the field or at sea.⁷

The President does not issue commands to ships and aircraft. If the power of command has any meaning, the President must have authority of command over individual military *people*. "The military" is not some monolithic institutional organ of the Executive Branch; it consists of people; its effectiveness in executing the will of the Commander in Chief is the collective consequence of individual obedience of command authority. Claims of individual exemption from the Commander in Chief's authority on the basis of perceived individual rights or subjective values set up a constitutional conflict between the President's power, which may only be exercised through subordinate people, and the constellation of individual rights enshrined in the Constitution. In cases of conflict, a delicate balance that affects the safety of the nation must be struck between the two. The courts have resolved this conflict overwhelmingly within the paradigm of presidential authority, and not within the more familiar paradigm of individual rights that may be vindicated through litigation.

Professor Louis Henkin, a prominent scholar of executive powers, has interpreted Supreme Court deference to the executive in foreign affairs cases as reflecting "a determination that the Executive Branch was acting within its authority and hence its actions were 'law for the courts.'"⁸ In essence, when the President exercises discretion within the core of his constitutional authority as a separately empowered branch of government, his act is the law. The President's Commander in Chief power is even more clearly committed to him uniquely under the Constitution than his foreign affairs powers. Accordingly, the President's exercise of unique military command functions, including inexorably the command of individual military people, should also be considered "law in action." If the President can command the supreme sacrifice of soldiers and seamen in combat,⁹ how can it be said that his Commander in Chief power is limited by the potential for embarrassment of disappointed flag and general officers?

⁶THE FEDERALIST No. 69, at 465 (Alexander Hamilton)(Jacob E. Cooke ed., 1961)(The Constitution vests in the President "supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy.").

⁷S. DOC. NO. 6, 103d Cong., 1st Sess., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 453 (1996)(President exercises supreme military command personally and directly); HAROLD F. BASS, JR., ET AL., POWERS OF THE PRESIDENCY 156-57 (1989); WARREN W. HASSLER, JR., THE PRESIDENT AS COMMANDER IN CHIEF 7-8 (1971)(The Framers believed the Commander in Chief could, "if he wished, assume personal command of troops in the field or of warships on the water."); LOUIS SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 47 (1951); HORACE CAMPBELL, AN INTRODUCTION TO MILITARY LAW 21 (1946)(President may assume military command in the field); CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 119 (1921)(Proposals at the Constitutional Convention to restrict the President's power to exercise "actual command in the field" were specifically rejected.).

⁸Gabriel W. Gorenstein, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 418-419 (1984)(citing Louis Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597, 612 (1976)).

The President exercises the Commander in Chief power through control of individuals. He appoints all military officers¹⁰—a discretionary power not subject to revision or compulsion by any other authority.¹¹ No act of Congress or even of the President can create a military officer or group of officers not subordinate to the President; the President may scrutinize the performance of his military subordinates and remove any of them at will.¹² Objective standards of merit or justice do not impose limits on such discretionary decisions. The President may exercise command authority guided by his own purely subjective inclinations, or by selfish political considerations. In most administrative personnel matters affecting officers, the President has always been the court of last resort.¹³ The fact that President Roosevelt exercised the powers of Commander in Chief more vigorously than most presidents¹⁴ does not affect the fundamental lawfulness of administrative actions taken under his aegis with respect to Kimmel and Short.

Because it would be physically impossible for the President to exercise all executive power personally, the courts have long recognized that the constitutional authority of the President is also expressed in the official acts of the service secretaries, "without containing express reference

⁹See, e.g., Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 558 (1994).

¹⁰E.g., HAROLD F. BASS, JR., ET AL., POWERS OF THE PRESIDENCY 167 (1989)(Presidents exercise control over the military through their appointments of military officers).

¹¹E.g., Congress may not compel the President to appoint, commission or promote particular individuals. 31 Op. Att'y Gen. 80 (1916); 30 Op. Att'y Gen. 177 (1913); 29 Op. Att'y Gen. 254 (1911); CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 127 (1921)("Congress can in no way dictate what appointment shall be made . . ."). An unenacted bill sponsored by Congressman Rarick in the House of Representatives on behalf of Rear Admiral Kimmel in 1968 (H.R. 18058, 99th Cong., 2d Sess. (1968)) evidenced an appreciation of the President's appointment power by *requesting* the President "to advance posthumously the late Rear Admiral Husband E. Kimmel . . ."

¹²7 Op. Att'y Gen. 453, 464-65 (1855). The President's authority over individual officers and groups of officers has been tested and proven in recent history. E.g., David McCullough, *Truman Fires MacArthur*, MIL. HIST. Q., Autumn 1992, at 8; R. GORDON HOAXIE, COMMAND DECISIONS AND THE PRESIDENCY 155-68 (1977)(discussing the "Revolt of the Admirals," a reaction to competition between carrier aviation and the B-36: "In the interest of national security" top naval officers sought to undermine the political resource allocation process to avert what they saw as the "emasculatation of the Navy." Secretary of the Navy Matthews effected, with Truman's approval, the relief of the Chief of Naval Operations and other senior officers. He forced other officers to retire and in one case revoked a temporary appointment, causing a flag officer to revert to his lower, regular grade.).

¹³See GLENDON A. SCHUBERT, JR., THE PRESIDENCY IN THE COURTS 179-180 (1957)("As the Commander in Chief, the President has from the beginnings of our government functioned as the highest court of appeals for those subject to military law.").

¹⁴E.g., William R. Emerson, *F.D.R.* (1941-1945), in THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF 149 (Ernest R. May ed., 1960)("Roosevelt was the real and not merely a nominal commander-in-chief of the armed forces. Every president has possessed the constitutional authority which that title indicates, but few presidents have shared Mr. Roosevelt's readiness to exercise it in fact and in detail and with such determination . . .").

to the direction of the President."¹⁵ Whether specifically directed by the President or not, actions taken in the Kimmel, Short and McVay cases by Secretary Knox, Secretary Forrestal, Secretary Stimson, and their successors, bear the authority of the Commander in Chief, and enjoy all the freedom of action accorded the President himself.¹⁶ Placement of the Commander in Chief power in the President and his appointed civilian deputies is not simply strategically appropriate to ensure the preeminence of rational policy in military affairs, as a practical consideration affecting the success of military effort in war.¹⁷ Placement of the Commander in Chief power in the President is an important constitutional guarantor of civilian control of the military in its relationship to the people of the United States,¹⁸ a fundamental principle in the Founders' domestic political philosophy.¹⁹

¹⁵7 Op. Att'y Gen. 453 (1855).

¹⁶See *United States v. Fletcher*, 148 U.S. 84, 88-90 (1892)(Presidential authority presumed in disciplinary action by Secretary of War); *United States v. Eliason*, 41 U.S. (2 How.) 291, 302 (1842)("The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation . . ."); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839)(presumption that official acts of department heads bear the authority of the President); *Seltzer v. United States*, 98 Ct. Cl. 554, 559-62 (1943)(Secretary of War acts with authority of the President, including the dismissal of officers); *McElrath v. United States*, 12 Ct. Cl. 201 (1876)(Order issued by SECNAV dismissing a naval officer was, in view of the law, the act of the President, without requirement that such order cite authority of the President.); 17 Op. Att'y Gen. 13 (1881); 7 Op. Att'y Gen. 453 (1855)(survey of judicial and historical precedents); 1 Op. Att'y Gen. 380 (1820)(Orders issued by the Secretaries of War and the Navy "are, in contemplation of law, not their orders, but the orders of the President."); PRESIDENTIAL POWER AND THE CONSTITUTION, ESSAYS BY EDWARD S. CORWIN 86 (Richard Loss ed., 1976); LOUIS SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 105 (1951)(The civilian departmental secretary is the "deputy of the duly elected political head of state . . . an outpost of the Chief Executive and a representative of the political party whose policies he is to pursue." (emphasis added)); MILTON C. JACOBS, OUTLINE OF MILITARY LAW: UNITED STATES SUPREME COURT DECISIONS 37-38 (1948); CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 21 (1921).

¹⁷See, e.g., MICHAEL I. HANDEL, MASTERS OF WAR: CLASSICAL STRATEGIC THOUGHT 49-52 (1992)(theory of Clausewitz and Sun Tzu).

¹⁸E.g., *Greer v. Spock*, 424 U.S. 828, 845-46 (1976)(Powell, J., concurring)("Command of the armed forces placed in the political head of state, elected by the people, assures civilian control of the military. Few concepts in our history have remained as free from challenge as this one."); *Parker v. Levy*, 417 U.S. 733, 751 (1974)("The military establishment is subject to the control of the civilian Commander in Chief and the civilian department heads under him, and its function is to carry out the policies made by those civilian superiors."); 10 Op. Att'y Gen. 74 (1861)("[W]hatever skillful soldier may lead our armies to victory against a foreign foe, or may quell a domestic insurrection; however high he may raise his professional renown, and whatever martial glory he may win, still he is subject to the orders of the civil magistrate, and he and his army are always subordinate to the civil power."); HAROLD F. BASS, JR., ET AL., POWERS OF THE PRESIDENCY 156 (1989)(By making the President the Commander in Chief "the Framers attempted to ensure that civilian authority would always direct the armed forces."); WARREN W. HASSLER, JR., THE PRESIDENT AS COMMANDER IN CHIEF 13 (1971)(The President's "control over . . . military chiefs is complete. Indeed if he lacked this power, civil control of the military would be impossible."); LOUIS SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 47 (1951)("By the plain intent of the constitution, every member of the military organization, whether it be the civilian secretary or the professional commander, is fully subject to his authority. If the President lacked this power, civil control would scarcely be possible . . .").

¹⁹E.g., *Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973)("It is this power of oversight and control of military forces by elected representatives and officials which underlies our entire constitutional system."); *Duncan v. Kahanamoku*,

The Military Milieu

"The essence of military service is the subordination of the desires and interests of the individual to the needs of the service."²⁰ One need not serve long in the armed forces to realize that authority and the discretion of one's superiors pervade the environment. Military personnel decisions that determine the course of one's service career and reach into the far corners of personal life are largely unappealable. The law applicable to such decisions is fundamentally different from law applicable in the civilian setting. In numerous decisions the Supreme Court has explained the rationale for upholding standards in the military context that differ from standards applicable to civilians. The following samples from Supreme Court pronouncements on this issue make the point clearly enough: "[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."²¹ "[M]ilitary necessity makes demands on its personnel 'without counterpart in civilian life.'"²² "The Court has often noted the peculiar and special relationship of the soldier to his superiors . . . ,"²³ and has acknowledged that 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty'"²⁴ "Centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns."²⁵ "The military constitutes a specialized community governed by a separate discipline from that of the civilian."²⁶ In *Parker v. Levy*, Justice Rehnquist, writing for the Court, stated:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long

327 U.S. 304, 325 (1946)("The supremacy of the civil over the military is one of our great heritages Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations"); MAURICE MATLOFF, ET AL., *AMERICAN MILITARY HISTORY* 16 (1985)(describing the principle of civilian control as "a fundamental safeguard"); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 202-03 (1985); EDMOND CHAN, *THE GREAT RIGHTS* 95 (1963)(quoting Chief Justice Earl Warren: "[T]he axiom of subordination of the military to the civil . . . is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life."); GEORGE F. MILTON, *THE USE OF PRESIDENTIAL POWER* 112 (reprint 1965)(1944).

²⁰*Orloff v. Willoughby*, 345 U.S. 83, 92 (1953).

²¹*Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

²²462 U.S. 296, at 300 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

²³*Id.* (quoting *United States v. Brown*, 248 U.S. 110, 112 (1957)).

²⁴*Id.* (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

²⁵*Id.*

²⁶*Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

history. The differences between military and civilian communities result from the fact that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.²⁷

Such statements by the Court are not merely dictum. In cases where service members have challenged military personnel decisions the courts have shown great deference to command authority, at the expense of claimed individual rights.²⁸ As stated in *Orloff v. Willoughby*, "[F]rom top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism, or other objectionable handling of men. But judges are not given the task of running the Army The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."²⁹

Central among the unique features of military life is the authority of senior officials in the chain of command to determine the qualifications for command, the suitability of individuals officers for assignment to positions of command, and the tenure of service in a position of command.³⁰ Military commanders have plenary authority to select or remove subordinate

²⁷417 U.S. 733, 743 (1974)(citations omitted).

²⁸*E.g.*, *United States v. Stanley*, 483 U.S. 669 (1987)(In a case involving nonconsensual, experimental administration of LSD, the Court held that service members have no cause of action under the Constitution for injuries suffered incident to service, even if persons not directly in the service member's chain of command inflicted injury); *Shearer v. United States*, 473 U.S. 52, 58 (1985)("Courts traditionally have been reluctant to intervene in any matter which 'goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman."); *Chappell v. Wallace*, 462 U.S. 296, 303 (1983)(Military personnel may not sue their superiors for violations of Constitutional rights); *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994)("There are thousands of routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or jurisdiction of the court to wrestle with."); *Simmons v. United States*, 406 F.2d 456, 459 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969)("That this court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government in regard to the necessity, method of selection, and composition of our defense forces is obvious and needs no further discussion."); *Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804, 813 (1979)(Courts "allow the widest possible latitude to the armed services in their administration of personnel matters.").

²⁹345 U.S. 83, 93-94 (1953).

³⁰*See Wood v. United States*, 968 F.2d 738 (8th Cir. 1992)(military decision regarding qualifications for command is nonjusticiable). A striking illustration of the subjective authority of senior officials to determine the qualifications and suitability of individual officers for particular positions in the military is the near-legendary personal interview process by which Admiral Hyman G. Rickover hand-picked officers for the Navy's nuclear power program and positions of responsibility within that program. NORMAN POLMAR & THOMAS B. ALLEN, *RICKOVER* 267-286 (1982). Writing specifically about Rear Admiral Kimmel's selection for the position of CominCh and CinCPac over the heads of other more senior officers, the Chief of Naval Personnel responded to an inquiry from Senator Scott Lucas that "Appointments such as that to Commander in Chief of a Fleet . . . are never made solely on a seniority basis but rather on the considered judgments and recommendations of high ranking

commanders to ensure efficient accomplishment of the military mission. A claim disputing a commander's exercise of the prerogative to shape his command in the manner that he feels is most likely to achieve unit cohesion and effective combat skills is plainly nonjusticiable. Judicial second-guessing of such fundamental command prerogatives as relief and reassignment of subordinate officers "would mean that commanding officers would have to stand prepared to convince a civilian court of a wide range of military . . . decisions,"³¹ risking the total breakdown of order and discipline. In the military context, administrative personnel decisions are subject to normative, objectively-based principles only when and to the extent that Congress (within its sphere of authority) or senior officials in the chain of command deem the use of such principles appropriate.

The selection of senior officers for key positions of command is both a military and a political decision. The President may base appointment to or removal from a critical position upon any combination of such factors as the experience of the nominee, his or her past performance, seniority, education, specific noteworthy achievements, and such unmeasurable, subjective factors as the officer's strategic or tactical "style," his or her personality, the judgment of senior officials about the officer's flexibility or adaptability to different circumstances, whether the officer will "fit in" with others in a particular position or location, what political or public relations impact a certain nomination might have, and simple favoritism. The President's power to select, assign and remove officers in three- and four-star positions is not fundamentally different from his power to select and shuffle his cabinet officers, heads of agencies, and other key political appointees within the Executive Branch. The President can remove civilian executive officers as easily as he can reassign military officers.³² The selection of individuals for positions

Naval officials. Their selection is naturally dependent upon numerous factors such as availability, competency, and seniority of the officer in question." CHNAVPERs ltr Pers-191-mjc of 27 Jun 46. Copies of all non-public official documents, records and correspondence cited in this paper are available in a special Pearl Harbor archive maintained by the Office of the Under Secretary of Defense (Personnel and Readiness)(Officer and Enlisted Performance Management)(USD(P&R)(OEPM)), or from the Office of the Judge Advocate General, Department of the Navy.

³¹Shearer v. United States, 473 U.S. 52, 58 (1985)

³²See, e.g., Myers v. United States, 272 U.S. 52 (1926)(Presidential prerogative to remove executive officials from office); Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Seance*, 60 TENN. L. REV. 841, 845 n.14 (1993)("Power to remove an officer is important because it permits the President to control the performance of that officer."); MARTIN S. SHEFFER, PRESIDENTIAL POWER 29-30 (1991)(President's "illimitable power" to remove officers exercising executive authority); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984 110, 423 (Randall W. Bland et al, eds., 5th ed., 1984)(same); *Id.*, at 122-23 (The potential for stigma in the dismissal of an officer by the President does not affect any case in which the President has the constitutional power of dismissal.). The tradition of illimitable Presidential removal power over appointees exercising executive authority is deeply rooted. E.g., *James Madison, Remarks During Debate on Establishing Department of Foreign Affairs*, in 1 ANNALS OF CONG. 515-17 (Joseph Gales ed., 1789)(President's power of removal follows from the Appointments Clause and the Executive Power Clause); 11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789 (Charles Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds. 1992), at 883 (Mr. Ames: "[A]dvantages may result from keeping the power of removal, in terrorem, over the heads of the officers; they will be stimulated to do their duty to the satisfaction of the principal . . ." Mr. Ames considered and rejected as a countervailing consideration that it might be difficult to get "officers of abilities to engage in the service of their country upon such terms."); PRESIDENTIAL POWER AND THE CONSTITUTION, ESSAYS

within the Executive Branch is clearly within the President's constitutionally-protected discretion, subject in most cases to the *added* political dimension of Senate confirmation.

All persons, military and civilian, who occupy high government office by specific personal appointment are exposed to political forces.³³ There is no doubt that political forces played some part in the post-Pearl Harbor events surrounding Rear Admiral Kimmel and Major General Short. That professional military officers in high positions of command are exposed to political forces is an ineluctable consequence of their great responsibilities, their public visibility, and the deeply-

BY EDWARD S. CORWIN 98-99 (Richard Loss ed., 1976)(on the "decision of 1789," a debate in the first Congress resolved in favor of construing the Constitution as empowering the President to dismiss executive officers at will).

³³For example, Secretary of Defense Cheney relieved General Michael Dugan, Chief of Staff of the Air Force, during Desert Shield in the Fall of 1990 without any "due process" hearing, and not based on responsibility for an operational failure. As the press reported, the Secretary relieved General Dugan for outspoken comments during the delicate period when the international coalition for Desert Storm was being forged, and the administration was seeking Congressional support for military operations. *E.g.*, Fred Kaplan, *Cheney Fires Air Force Chief of Staff*, BOSTON GLOBE, Sept. 8, 1990, at 1; Janet Cawley, *Air Force Chief Fired Over Remarks*, CHI. TRIB., Sep. 18, 1990, at 1 (Secretary Cheney commented that General Dugan "showed poor judgment at a very sensitive time."). The nomination of Admiral Frank Kelso (Chief of Naval Operations) for retirement in four-star grade was clouded in Senate confirmation proceedings by political debate over the Tailhook incident. *E.g.*, Michael Ross and Karen Tumulty, *Senate to Retire Kelso at 4 Stars, After Fiery Debate*, L.A. TIMES, Apr. 20, 1994, at A1, col. 3. By order of President Truman, Secretary of the Navy Matthews relieved Admiral Louis E. Denfield, Chief of Naval Operations from 1947 to 1949, over a political dispute concerning testimony given by Denfield at a hearing chaired by Congressman Carl Vinson. Denfield learned of his relief from a radio newscast. *See* Paolo E. Coletta, *Louis Emil Denfield*, in THE CHIEFS OF NAVAL OPERATIONS 202-05 (Robert William Love, Jr., ed. 1980). In April 1951, based on disagreements over U.S. policy in the Far East, President Truman directed the summary relief and recall of General Douglas MacArthur, insisting that he be fired instead of being allowed to retire, an "unceremonious, peremptory dismissal," setting off a political firestorm. WILLIAM MANCHESTER, AMERICAN CAESAR 648-55 (1978); D. CLAYTON JAMES, COMMAND CRISIS: MACARTHUR AND THE KOREAN WAR 6 (1982)("The clash played no small part in killing Truman's chance for another term as President."). MacArthur first learned of his relief through a public radio broadcast. *Id.*, at 7. *See also* Forrest C. Pogue, *Marshall on Civil-Military Relations*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES 202 (Richard H. Kohn ed., 1991)(General Marshall "reluctantly accepted" that politically-based appointments and promotions "were prerogatives of the President."); MARTIN S. SHEFFER, PRESIDENTIAL POWER viii (1991)("Roosevelt removed duly appointed and confirmed individuals from office without cause for partisan political reasons . . ."); WARREN W. HASSLER, JR., THE PRESIDENT AS COMMANDER IN CHIEF 39 (1971)(To silence critical public opinion of the conduct of the War of 1812, during which British forces burned parts of Washington, President James Madison demanded and accepted the resignation of Secretary of War Eustis.); T. Harry Williams, *Lincoln (1861-1865)*, in THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF 86 (Ernest R. May ed., 1960)("Lincoln handed out many commissions at the start of the war for reasons that were completely political . . . , dispens[ing] commissions to ambitious political chieftains." The use of military patronage to give prominent members of many diverse groups a "stake" in the war was a "good investment in national cohesion."); TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 13-28 (reprint 1974)(1955)(Congress conducted its first investigation in 1792, of a disastrous military defeat under the command of Major General Arthur St. Clair. The whole St. Clair affair became entangled in Federalist/Antifederalist politics and St. Clair "was left accused but unjudged."); T. HARRY WILLIAMS, LINCOLN AND HIS GENERALS 323-24 (1952)(Lincoln stalled on Grant's request to relieve Butler, a political patronage appointee, because Butler was a prominent Democrat and it was an election year—"Grant understood the vital relationship in a democracy between war and politics."). Several books could not exhaust this subject. Failure to anticipate exposure to hard politics at levels in the chain of command only several steps removed from the President is naive bordering on foolish.

rooted Constitutional principle of civilian control of the military. Proximity to the President in the chain of command is proximity to the politics which have always surrounded the Presidency.

The relationship of the President and his civilian deputies to subordinate military officers is characterized not by the rights of officers but by the broad authority of the President. Appointment to flag or general rank, and service in important positions of command, are fragile privileges, not rights. How fragile such privileges are is suggested poignantly by the comment of President Lincoln upon being informed that a brigadier general had been captured with some horses and mules: "I don't care so much for brigadiers;" the President demurred, "I can make them. But horses and mules cost money."³⁴

II. Case Study: The Pearl Harbor Commanders

Family members of Rear Admiral Kimmel and Major General Short, and assorted advocates of their cause, have sought posthumous advancement of the two officers for decades as a species of remedial justice for what they perceive as the scapegoating of Kimmel and Short to shield the Roosevelt administration from blame for the Pearl Harbor disaster.³⁵ This campaign for symbolic apology reached a fevered pitch in recent years, with the approach and passing of the fiftieth anniversary of the Second World War.³⁶ Most recently, Senator Strom Thurmond

³⁴T. Harry Williams, *Lincoln (1861-1865)*, in *THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF* 85-86 (Ernest R. May ed., 1960); T. HARRY WILLIAMS, *LINCOLN AND HIS GENERALS* 10 (1952).

³⁵See, e.g., the "Thirty-six Flag Officer Petition," 22 Oct 91 (to President Bush, signed by 32 admirals, three vice-admirals and one rear admiral, including Admirals Thomas Moorer, William Crowe, James Holloway III, Elmo Zumwalt, and Thomas Hayward), at 2 ("A partial atonement can be achieved by posthumously promoting these two officers [Kimmel and Short] to the ranks they held at the time of the attack, promotions to which they are *entitled by law*." (emphasis added)). Whether any officer can be "entitled" to a promotion is discussed *infra*, at pp. 23-25.

³⁶The Kimmel campaign has claimed the attention of numerous high-ranking officials who have considered and rejected the appeal for posthumous advancement. E.g., DEPSECDEF (White) ltr of 27 Dec 95 (to Senator Strom Thurmond); President Clinton ltr of 1 Dec 94 (to Manning Kimmel IV)("I agree with the judgment of prior investigatory commissions."); SECDEF (Perry) ltr of 22 Nov 94 (to Edward Kimmel); SECDEF (Perry) ltr of 7 Sep 94 (to Edward Kimmel); Chief of Legislative Affairs (Bowman) ltr of 23 Aug 93 (to HASC Chairman Dellums); CNO (Kelso) ltr 3U080549 of 1 Jul 93 (to Edward Kimmel); Military Assistant to President Bush (Trefry) ltr of 19 Nov 91 (to Edward Kimmel)("A possible posthumous promotion of Admiral Kimmel has been considered within the Department of Defense numerous times in the past and the suggestion has been rejected in each instance."); UNSECNAV (Howard) ltr of 21 Aug 91 (to Edward Kimmel); SECNAV (Garrett) ltr of 19 Mar 91 (to Senator Joseph Biden); Assistant VCNO (Wileen) ltr of 12 Sep 90 (to Senator Pete Wilson); SECDEF (Cheney) ltr of 13 Jun 90 (to Senator William Roth); SECDEF (Cheney) ltr of 23 Oct 89 (to Jackie Montgomery); DEPSECDEF (Taft) ltr of 19 Jan 89 (to SECNAV)(declining to forward the Kimmel issue to the President). Senior officials have also rejected numerous efforts on behalf of Major General Short. DEPSECDEF (White) ltr of 27 Dec 95 (to Senator Strom Thurmond); SECARMY (West) memo of 30 Nov 95 (for USD(P&R)); SECARMY (Stone) ltr of 2 Sep 92 (to Senator Pete Domenici); Deputy Assistant Secretary of the Army (Matthews) memo SAMR-RB of 19 Dec 91 (officially denying ABCMR petition to advance MGEN Short). The Kimmel campaign peaked before the fiftieth anniversary of the attack on Pearl Harbor when President Bush declined to "reverse the course of history"

sponsored a meeting at which advocates for Kimmel and Short aired grievances against the government.³⁷ At this hearing Senator Thurmond extracted from then-Deputy Secretary of Defense John Deutch (facing imminent Senate confirmation hearings on his nomination as Director of Central Intelligence) a promise to conduct a thorough reconsideration of the entire Pearl Harbor dispute and the personnel actions taken with respect to Kimmel and Short. The fulfillment of that promise was the "Dorn Report," prepared by Edwin Dorn, Under Secretary of Defense (Personnel and Readiness), accompanied by an extensive "Staff Study."³⁸ The *Dorn Report* and *Staff Study* recommended against posthumous advancement, which conclusion the new Deputy Secretary of Defense, John White, endorsed and communicated to Senator Thurmond on December 27, 1995.

The first case study in this paper (*The Pearl Harbor Commanders*) is, in part, an elaboration of the author's work as a member of the ad hoc task force that supported the USD(P&R) *Staff Study*. The focus of this first case study is to answer long-standing claims that various personnel actions taken with respect to Rear Admiral Kimmel and Major General Short were legally deficient. As demonstrated herein, such claims are without merit.

Relief of Command

On February 1, 1941, Rear Admiral Husband E. Kimmel relieved Admiral J. O. Richardson as Commander in Chief, Pacific Fleet and Commander in Chief, United States Fleet.³⁹ Solely as an incident of assuming this position of command, Rear Admiral Kimmel also assumed

by nominating Rear Admiral Kimmel for posthumous advancement in time for Pearl Harbor Day ceremonies. See *Pearl Harbor Admiral's Sons Fighting to Clear His Name*, ATL. J. & CONST., Dec. 8, 1991, at A11.

³⁷See *Remarks at Meeting of the Office of the Secretary of Defense and Members of the Kimmel Family Dealing with the Posthumous Restoration of the Rank of Admiral for Rear Admiral Husband E. Kimmel*, United States Navy, Apr. 27, 1995 [hereinafter *Thurmond Hearing*](transcript of informal hearing conducted by Senator Thurmond, transcribed by L.B.S., Inc.), available at <http://www.erols.com/nbeach/kimmel.html>.

³⁸USD(P&R) memo of 15 Dec 95 (for DEPSECDEF)(Subj: Advancement of Rear Admiral Kimmel and Major General Short)[hereinafter *Dorn Report*]; [Staff Study], *Advancement of Rear Admiral Kimmel and Major General Short on the Retired List*, 1 Dec 95 (prepared under the supervision of Nicholai Timenes, Assistant to USD(P&R)(MPP))[hereinafter *Dorn Report (Staff Study)*]. Both documents are available at <http://www.sperry-marine.com:80/pearl/dorn.htm>.

³⁹Franklin D. Roosevelt ltr Nav-3-D of 7 Jan 41 (to Rear Admiral Husband E. Kimmel)("In accordance with the provisions of an Act of Congress approved May 22, 1917, you are hereby designated as Commander in Chief, Pacific Fleet, with additional duty as Commander in Chief, United States Fleet, with the rank of admiral, effective on the date of your taking over the command of the Pacific Fleet. In accordance with this designation you will assume the rank and hoist the flag of admiral on the above mentioned date."). Documents in Rear Admiral Kimmel's service record indicate that he assumed duties as CinCPac and CominCh on February 1, 1941. "CinCPac" was the acronym used for Commander in Chief, Pacific Fleet, and "CominCh" was the acronym used for "Commander in Chief, United States Fleet," a position that included responsibility for coordination among the various fleet commands.

the temporary rank of Admiral.⁴⁰ On February 7, 1941, Major General Walter C. Short assumed duty as Commander, Hawaiian Department, and with it the temporary rank of Lieutenant General.⁴¹ At the time, the highest regular or "permanent" grade that officers of the armed forces could hold was Rear Admiral or Major General (O-8).⁴²

Before relieving Richardson, Kimmel had been serving at Pearl Harbor as Commander Cruisers, Battle Force, with additional duty as Commander, Cruiser Division Nine.⁴³ He had been commissioned a regular Rear Admiral since November 1, 1937, and was junior to a number of other permanent rear admirals the President might have chosen as Richardson's relief.⁴⁴ The President had obviously cut short Richardson's tour of duty as CinCPac and CominCh. Kimmel subsequently learned that the President had directed the early relief of Richardson due to a disagreement over retention of the Pacific Fleet at Pearl Harbor, away from its customary West Coast homeports.⁴⁵ Kimmel knew that he had attained this unexpected⁴⁶ assignment as CinCPac

⁴⁰Then-existing law allowed the President to designate six officers as Commanders of Fleets or subdivisions thereof with the rank of Admiral or Vice Admiral. Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89. Such advancements to the rank of Admiral or Vice Admiral were effective only during the incumbency of the designated flag officer. *Id.* ("... when an officer with the rank of admiral or vice admiral is detached from the command of a fleet or subdivision thereof... he shall return to his regular rank in the list of officers of the Navy...").

⁴¹*Hearings Before the Joint Committee on the Investigation of the Pearl Harbor Attack*, 79th Cong., 1st Sess. (pursuant to S. Con. Res. 27)(1946)[hereinafter PHA], Part 7, at 2967 (his temporary promotion was effective on February 8, 1941). A fire at the National Personnel Records Center destroyed Major General Short's official service record in 1973. References to personnel actions affecting Major General Short must be made to his official "reconstructed record" or to secondary sources such as exhibits in the PHA record. Major General Short's temporary designation as a Lieutenant General was a consequence of Act of Aug. 5, 1939, ch. 454, 53 Stat. 1214, *as amended*, Act of July 31, 1940, ch. 647, 54 Stat. 781. The Act of August 5, 1939 provided that "the major generals of the Regular Army specifically assigned by the Secretary of War to command the four armies of the United States Army shall have the rank and title of lieutenant general *while so serving*." (emphasis added). The Act of July 31, 1940 amended the above-quoted Act "to include the major generals of the Regular Army specifically assigned by the Secretary of War to command the Panama Canal and Hawaiian Departments."

⁴²This had long been the case. For example, Admiral Charles Frederick Hughes, the Chief of Naval Operations from 1927-1930, retired in his permanent grade of Rear Admiral. William R. Braisted, *Charles Frederick Hughes*, in *THE CHIEFS OF NAVAL OPERATIONS* 66 (Robert William Love, Jr., ed., 1980). Reflecting this tradition, until recently retirement in a higher grade than O-8 required separate nomination by the President and confirmation by the Senate. *See infra*, p. 57 n.273.

⁴³Rear Admiral Kimmel held these command positions from April 6, 1939 to February 1, 1941, when he assumed the duties of CinCPac and CominCh.

⁴⁴As stated in Chief of Naval Personnel ltr PERS-191-mjc of 27 Jun 46, when the President designated Rear Admiral Kimmel to relieve Admiral Richardson "there were approximately 16 officers of flag rank who were still on active duty, and were eligible for such a designation, and were ahead of Admiral Kimmel on the seniority list."

⁴⁵Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 69.

⁴⁶PHA6, at 2498, 2714 ("a complete surprise").

and CominCh, and consequently the rank of Admiral, as the result, in part, of the summary relief of his predecessor at the direction of President Roosevelt.⁴⁷

After the Japanese attack on Pearl Harbor the service secretaries relieved both Kimmel and Short of their commands,⁴⁸ whereupon the commanders reverted, by operation of law, to their regular grades of Rear Admiral and Major General. The following discussion explores the subjective discretion of senior officials in the chain of command to relieve subordinate commanders, and the propriety of the relief of Kimmel and Short from command by the Secretaries of the Navy and War Departments.

Law Applicable to Relief of Command

No one in the military has a right to any particular assignment or position⁴⁹ and may be reassigned to a position of greater or lesser responsibility by senior officials in the chain of command at the discretion of such officials.⁵⁰ This authority flows from the President's

⁴⁷Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 69 ("His [Admiral Richardson's] summary removal was my first concern. I was informed that Richardson had been removed from command because he hurt Mr. Roosevelt's feelings by some forceful recommendations . . ."). On Richardson's relief see R. GORDON HOAXIE, *COMMAND DECISIONS AND THE PRESIDENCY* 47 (1977)(Admiral J. O. Richardson relieved of command in February 1941 after his outspoken protest of the vulnerability of Pearl Harbor). Kimmel came by his command and four-star status through the exercise of a power that could obviously revoke what it bestowed.

⁴⁸Secretary of the Navy Knox directed the relief of Admiral Kimmel on December 16, 1941 (PHA5, at 2430), confirmed by SECNAV ltr 14358 of 3 Jan 42. Secretary of War Stimson directed the relief of Lieutenant General Short on December 16, 1941 (PHA3, at 1529), confirmed by telegram of January 6, 1942. In later testimony at the PHA hearings, Admiral Stark and General Marshall were unable to confirm whether the President himself directed such reliefs to be effected (PHA5, at 2430; PHA3, at 1529-30), but Admiral Stark related that Secretary Knox took the action after returning from a meeting at the White House (PHA5, at 2430). In any event, the official acts of the secretaries carry the weight of presidential authority. *Supra*, pp. 5-6 nn.15-16.

⁴⁹E.g., *Orloff v. Willoughby*, 345 U.S. 83 (1953)(no right to particular duty assignment); Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 562 (1994)("[N]o Servicemember is guaranteed a particular assignment in a particular location . . . Every military man and woman must be prepared to serve wherever and in whatever capacity the Armed Forces require their skills." (quoting General Colin Powell's written response to a question posed by the Senate Armed Services Committee)).

⁵⁰Navy regulations in effect at the time of the attack on Pearl Harbor provided specifically that "[o]fficers of the Navy shall perform such duty at sea or on shore as may be assigned them by the department." U.S. Navy Regulations, art. 161 (1920). See *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)("There must be a wide latitude to those in command to determine duty assignments . . ."); *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986)(Military enjoys "broad discretionary authority with respect to transfers of military personnel."); Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 559 (1994)(Duties and assignments are determined by military necessity, not personal choice.). Cf. *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972)(Court declined to interfere with military discretion to issue transfer orders, notwithstanding appearance of command retaliation in reassignment.).

constitutional powers as Commander in Chief,⁵¹ and is so well established that the courts do not recognize an individual right to seek judicial review of military personnel assignment decisions.⁵² The courts recognize their own lack of practical competence to review and revise such decisions,⁵³ as well as the separation of powers principles that protect from judicial interference Executive Branch discretion to determine the assignments of military personnel.⁵⁴

The power to assign military personnel includes the power to reassign them, including the most senior officers. Examples of the summary relief of officers in high positions of command are legion.⁵⁵ The authority to replace military personnel in key positions of command before their

⁵¹See, e.g., *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979)(President as Commander in Chief has power to deploy troops and assign duties as he deems necessary.); 9 Op. Att'y Gen. 462, 468 (1860)(Advising the President: "As commander-in-chief of the Army it is your right to decide according to your own judgment what officer shall perform any particular duty."); LOUIS SMITH, *AMERICAN DEMOCRACY AND MILITARY POWER* 48 (1951)("[T]he President has complete freedom in choosing any officer for particular duty or command . . . and this without regard to seniority in rank."); CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 127 (1921)("The President is entirely free to select whom he will from among the officers for any particular duty or command . . .").

⁵²*Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)(no right to judicial review of duty assignment—"[W]e have found no case where this court has assumed to revise duty orders as to one lawfully in the service."); *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970)(Courts have no jurisdiction to review military duty assignments.)

⁵³E.g., *Covington v. Anderson*, 487 F.2d 660, 665 (9th Cir. 1973)(quoting with approval *Arnheiter v. Ignatius*, 292 F. Supp. 911, 921 (N.D. Cal. 1968), *aff'd sub nom* *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970)("Any attempt of the federal courts . . . to take over review of military duty assignments, commands and promotions would obviously be fraught with practical difficulties for both the armed forces and the courts."). See also *Chappell v. Wallace*, 462 U.S. 296, 305 (1983)(quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187 (1962): "[T]he special relationships that define military life have supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that 'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'").

⁵⁴*Orloff v. Willoughby*, 345 U.S. 83 (1953); *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986); *Wilson v. Walker*, 777 F.2d 427, 429 (8th Cir. 1985)("[T]raditional notions of judicial restraint and of the separation of powers" require courts to refrain from interfering in such matters as military duty assignments.); *Covington v. Anderson*, 487 F.2d 660, 665 (9th Cir. 1973); *Luftig v. McNamara*, 252 F. Supp. 819 (D.D.C. 1966)(Court refused to enjoin plaintiff's duty assignment on grounds that it could not preempt the Commander in Chief's judgment concerning disposition of forces). See Edward F. Sherman, *Judicial Review of Military Determinations*, 55 VA. L. REV. 483 (1969)(Judicial reluctance to review military personnel determinations is based on (1) inability of the courts to gauge the effects of judicial intrusion on unique discipline requirements of the military, and (2) separation of powers principles.).

⁵⁵E.g., LEWIS W. KOENIG, *THE CHIEF EXECUTIVE* 243-45 (3d ed. 1975)(McClellan and MacArthur); WARREN W. HASSLER, JR., *THE PRESIDENT AS COMMANDER IN CHIEF* 61-67 (1971)(Lincoln's appointment and removal of Army commanders); T. HARRY WILLIAMS, *LINCOLN AND HIS GENERALS* (1952), at 8, 43 (Lincoln appointed McClellan to relieve Winfield Scott), 38-39 (Lincoln dispatched the Secretary of War to relieve Fremont, who, pained and humiliated, begged for a chance to deliver a victory before official delivery of Lincoln's letter), 57 (Lincoln replaced Secretary of War Cameron with Stanton), 70-71 (Lincoln relieved McClellan as General in Chief of the Army—the relieving order was published in the newspapers before delivery to McClellan, who discovered it by a telegram from friends), 134 (Lincoln appointed Halleck General in Chief), 151, 182-83 (Lincoln directed Halleck to relieve Buell), 161 (Lincoln directed Halleck to relieve Pope), 177 (Lincoln relieved McClellan of his remaining command and appointed Burnside in his place), 206 (Lincoln relieved Burnside and appointed Hooker), 214, 347

regular rotation dates has been exercised with more or less vigor depending on the exigencies of peace or war, and on the personal styles of different Presidents and other senior officials in the chain of command. The authority to relieve an officer of command, however, remains a key constitutional prerogative of the President,⁵⁶ whether exercised personally or through his executive officers. No procedures and no substantive standards apply to relief of command by the Commander in Chief. A subordinate commander's potential to render future effective service, whether he is actually guilty of some offense or inadequacy in command, whether all the facts precipitating his relief are established by adequate evidence, or whether he has been allowed to make a statement or present his own evidence are all irrelevant. The decision to relieve an officer of command is in no sense adjudicative. The President has plenary, unreviewable authority to assign and relieve officers.⁵⁷ As President Truman stated of his relief of General MacArthur during the Korean War: "You hire them, and you fire them."⁵⁸

(Lincoln relieved Butler, a political patronage appointment), 231-32 (Grant relieved McClernand, who appealed to Lincoln; Lincoln responded: "Better leave it where the law of the case has placed it."), 259-60 (Lincoln relieved Hooker and appointed Meade), 297 (Congress revived the rank of lieutenant general, to which Lincoln appointed Major General Grant, who replaced Halleck as General in Chief).

That Chief of Staff George C. Marshall turned the Army rank structure upside down in preparation for World War II is also well known. Marshall relieved hundreds of senior officers of their posts and forced others into retirement, most of them without the distinction of having presided over a national disaster beforehand. Moreover, many junior officers, including one Colonel Eisenhower, were promoted over the heads of hundreds of more senior officers during the war. The high visibility of Marshall's personal shaping of the Army officer corps, including his use of an ad hoc "plucking board," demonstrates the understanding of the law relating to the rights of officers in their posts that prevailed in the armed forces at the time. See FORREST C. POGUE, *GEORGE C. MARSHALL* 92-100 (1965)("[A]greeing to the harsh reproach that he was ruthless in removing officers from command," Marshall responded that he "was preparing an army for war and felt that the selection of those who could lead in battle was a duty he owed the state."); ED CRAY, *GENERAL OF THE ARMY: GEORGE C. MARSHALL, SOLDIER AND STATESMAN* 174-76 (1990)(Through his personally supervised program of promotions and forced retirements, Marshall shaped "an army in his own image.").

In company with General Short, the following Army Major Generals were relieved during the Second World War and reverted to their permanent ranks: Carlos Brewer, Lloyd D. Brown, William G. McMahon, Lindsay M. Sylvester, Leroy Watson, Henry W. Baird, Julian F. Barnes, Joseph M. Cummins, Ernest J. Dawley, James P. Marley, James L. Muir, and Paul L. Ranson. CSJAGA 1949/3757 (CSGPA 201)(LGEN Brooks to GEN Bradley), 13 May 49. Admiral Ernest J. King, Chief of Naval Operations from 1942 through 1945, was notorious for his hard-nosed insistence on personally assigning all flag officers, commanding officers of capital ships and holders of major shore billets. King replaced several flag officers during World War II. President Truman's relief of General MacArthur during the Korean War may be the most dramatic recent example of Presidential exercise of the power to choose commanders. David McCullough, *Truman Fires MacArthur*, MIL. HIST. Q., Autumn 1992, at 8; DOROTHY SHAFFTER & DOROTHY M. MATHEWS, *THE POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES* (H.R. DOC. NO. 443, 84th Cong., 2d Sess.) 13 (1956).

⁵⁶E.g., LEWIS W. KOENIG, *THE CHIEF EXECUTIVE* 242-43 (3d ed. 1975)("As Commander-in-Chief the President appoints and removes his field generals."); WARREN W. HASSLER, JR., *THE PRESIDENT AS COMMANDER IN CHIEF* 9 (1971)("As part of his authority as Commander in Chief, the Chief Executive was empowered by the Constitution . . . at any time to . . . change commanders, or directly interfere in any detail of command . . ."); LOUIS SMITH, *AMERICAN DEMOCRACY AND MILITARY POWER* 48 (1951)("[T]he President . . . may at his discretion remove any officer from a position of command.").

⁵⁷CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 2 (1976)("In exercising his lofty prerogatives as 'Commander in Chief of the Army and Navy of the United States,' the President would seem to enjoy a peculiar degree of freedom from the review and restraints of the judicial process The . . . appointment

The removal of officers from their posts by lesser officials within the military is governed by service procedures to ensure that meritorious officers are not discarded through hasty decisions. Such procedures, to the extent that any procedures are implemented, are designed to ensure that seniors in the chain of command review the merits of decisions to relieve subordinate officers. Review is provided to ensure that the discretion to relieve subordinate officers is exercised wisely—not because individual officers have enforceable "due process" rights in such decisions.⁵⁹ Reflecting longstanding Navy tradition, procedures in the current *Naval Military Personnel Manual* governing "detachment for cause" recognize four reasons for removal of any officer from his assigned post, providing for the highest degree of discretion in the relief of officers serving in positions of command: mere "loss of confidence in an officer in command."⁶⁰ Officers in command are exposed to the risk of detachment based solely on the subjective loss of confidence of their superiors. This highly discretionary basis for detachment of an officer in command reflects the critical importance of trust and confidence in the chain of command:

The unique position of trust and responsibility an officer in command possesses;
his or her role in shaping morale, good order, and discipline within the command;

and removal of 'high brass' . . . are matters over which no court would or could exercise the slightest measure of judgment or restraint. For his conduct of such affairs the President is responsible, so far as he can be held responsible, only to Congress, the electorate, and the pages of history."). See *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970)(no jurisdiction to review relief of commanding officer).

⁵⁸WARREN W. HASSLER, JR., THE PRESIDENT AS COMMANDER IN CHIEF 128 (1971). That the sweeping Constitutional power of the President over the assignments of officers might not have been clear to Rear Admiral Kimmel is reflected in Kimmel's verdict upon President Roosevelt's relief of Richardson, Kimmel's predecessor: "I could see then and can see now no adequate reason for his removal from command in such a manner." Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 69. The President need not have or express any reason for such decisions.

⁵⁹E.g., *Wilson v. Walker*, 777 F.2d 427 (8th Cir. 1985)(no individual due process interest in duty assignment); *Arnheiter v. Ignatius*, 292 F. Supp. 911, 926 (N.D. Ca. 1968), *aff'd sub nom* *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970)(Summary relief of officer in command was "purely internal, administrative, non-punitive Navy action" and was "clearly within its [the Navy's] powers."); *Palmer v. United States*, 72 Ct. Cl. 401, 406 (1931)(Military departmental regulations that might not have been followed existed "solely in the interest of orderly and consistent procedures in the service" and did not create personal rights.).

⁶⁰DAJAG (Admin Law) memo 5800 Ser IMA1156A.92 of 6 Oct 92 (to CINCPACFLT FJA)(Detachment of an officer "for cause" may, in accordance with applicable regulations, be based upon the subjective standard of "loss of confidence in an officer in command."). Commenting on the relief of MacArthur, General Omar Bradley pointed out that the President has the right to fire any officer "at any time he sees fit," even if he has merely lost confidence in the man's judgment. WILLIAM MANCHESTER, *AMERICAN CAESAR* 648-55 (1978). The other bases for detachment for cause of an officer under current regulations include (1) misconduct, (2) unsatisfactory performance involving one or more significant events resulting from gross negligence or disregard of duty, and (3) unsatisfactory performance of duty over an extended period of time. U.S. NAVY, *NAVAL MILITARY PERSONNEL MANUAL* [hereinafter *MILPERSMAN*] (NAVPERS 15560C)(1995), art. 3410105.3. See also U.S. NAVY, *BUREAU OF NAVAL PERSONNEL MANUAL* (NAVPERS 15791A)(1959), art. C-7801(4). Army policy for relief of an officer in command is stated in AR 600-20 (30 Mar 88), par. 2-15 (Written action to relieve must be reviewed by the first general officer in the chain of command.).

and his or her influence on mission requirements and command readiness make it imperative that immediate superiors have full confidence in the officer's judgment and ability to command.⁶¹

The *Naval Military Personnel Manual* states further that "[a]n evaluation by a superior in the chain of command of failure on the part of an officer in command to exercise sound judgment in one or more areas and loss of confidence will constitute a sufficient basis to request the DFC [Detachment for Cause] of that officer." After detailing the administrative process required to effect a "detachment for cause," the *Manual* distinguishes "summary relief." "Nothing in the foregoing derogates the inherent authority of a superior in command to relieve an officer in command of a subordinate unit to ensure accomplishment of the assigned mission."⁶² "Summary relief" involves *no* process and may be effected instantaneously. The difference between summary relief and detachment for cause is that a specific, stigmatic record of the detachment process may not be inserted in an officer's official promotion record until administrative detachment for cause procedures are accomplished. These procedures do not protect an individual's continuity in command or in any other assignment; they relate to the type of record that will be made of a relief and whether future selection boards may consider details surrounding the relief.

Under service regulations, removal of an officer from a position of command does not require adversarial, trial-like procedures (e.g., confrontation and cross-examination of witnesses, compulsory process to secure the attendance of witnesses and the production of documents, and representation by legal counsel).⁶³ Such procedures would be extremely corrosive of discipline, pit subordinates and superiors in a chain of command against each other, and make more difficult the process of ensuring unit cohesion and the ability of a military unit to fulfill its mission.⁶⁴ The decision of a superior commander in the chain of command to relieve a subordinate commander may be "reversed" by others in the chain of command yet superior to the commander who decided to effect such a relief. When the President himself decides to relieve a commander, however, there is no appeal or review unless the President, in his sole discretion, decides to entertain additional matters in favor of the officer he has relieved.

The ability to select and remove military leaders in key positions is a fundamental, strategic component of Presidential command authority.⁶⁵ As experience has taught, the

⁶¹MILPERSMAN 3410105.3d.

⁶²MILPERSMAN 3410105.7f.

⁶³*Cf.* DAJAG (Admin Law) memo 5800 Ser 1MA1156A.92 of 6 Oct 92 (to CINCPACFLT FJA)(Detachment of an officer for cause is an example of the type of discretionary "final agency action" that does not require a hearing under the Administrative Procedures Act.).

⁶⁴*E.g.*, *Sebra v. Neville*, 801 F.2d 1135, 1141 (9th Cir. 1986)("The policy behind these decisions [citations omitted] is clear: the military would grind to a halt if every transfer were open to legal challenge.").

⁶⁵*See, e.g.*, MICHAEL I. HANDEL, *MASTERS OF WAR: CLASSICAL STRATEGIC THOUGHT* 153-176 (1992)(importance and characteristics of the effective military commander); Scott Shuger, *General Failure; What the Press Doesn't Tell You About America's Military Leaders*, 23 WASH. MONTHLY, Mar. 1991, No. 3, at 11 ("[A]n essential component of success in war is generalship (and admiralship). A crafty general is the ultimate smart weapon

preservation of vital national interests (indeed at one time the nation itself) demands no less than unfettered discretion of the President and his appointed commanders to assign to key positions those subordinate commanders deemed most capable of achieving success.⁶⁶ Next after President Lincoln, President Franklin D. Roosevelt exercised the power to select and assign duties to his subordinate military commanders most aggressively.⁶⁷ Kimmel and Short were two among many who experienced the President's personal exercise of command authority as "first General and Admiral."⁶⁸

As staunch a defender of Rear Admiral Kimmel as his predecessor, Admiral J. O. Richardson, has stated that

[T]he reliefs of Kimmel and Short should have been despatched as soon as possible. The Army and Navy and everyone else would have understood and approved this action, because all would have recognized that, regardless of

Generals are weapons too. And like any other weapon, they should be evaluated for what they bring to a war effort Like any other reasonably complex task, fighting war has objective and subjective components. And the quality of command is one of those subjective components that is essential to a war's outcome."); LEWIS W. KOENIG, *THE CHIEF EXECUTIVE* 242-43 (3d ed. 1975)("In wartime" the President's authority to choose commanders "is especially important because of the consequences of the President's choice for the nation's survival and his own political future."); T. Harry Williams, *Lincoln* (1861-1865), in *THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF* 85-86 (Ernest R. May ed., 1960)("One of the most important functions Commander in Chief Lincoln had to perform was choosing generals to manage the armies."); LOUIS SMITH, *AMERICAN DEMOCRACY AND MILITARY POWER* 48 (1951)("One of the essential powers of the President as commander-in-chief is that of naming the commanders of forces in the field."); BARON ANTOINE-HENRI DE JOMINI, *THE ART OF WAR* 43 (Philadelphia, J. B. Lippincott 1862)("If the skill of the general is one of the surest elements of victory, it will be readily seen that the judicious selection of generals is one of the most delicate points in the science of government and one of the most essential parts of the military policy of a state."). All citizens may enjoy fundamental rights equally in the eyes of the civil law, but all commanders are not equal warriors. People fight wars, and the employment of people in the military in the manner deemed most likely to achieve success is central to the Commander in Chief power. The power of selection is entirely a subjective one, entrusted uniquely to the President. The courts have recognized the relationship between the assignment of different tasks to different individuals and overall military efficiency (the human-strategic dimension of personnel assignments), as well as the importance of Presidential autonomy in this area. *E.g.*, *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986)("[M]ilitary transfer decisions go to the core of deployment of troops and overall strategies"); *Luftig v. McNamara*, 252 F. Supp. 819, 821 (D.D.C. 1966)("The courts may not substitute themselves for the Commander in Chief of the Army and Navy and determine the disposition of members of the Armed Forces.").

⁶⁶*See, e.g.*, T. HARRY WILLIAMS, *LINCOLN AND HIS GENERALS* 151 (1952)(General in Chief Halleck's comment on Lincoln's vigorous exercise of the Commander in Chief power with respect to assignment of commanders: "The government seems determined to apply the guillotine to all unsuccessful generals."). Indeed, one of the faults attributed to General Short by the Army Pearl Harbor Board was "not replacing inefficient staff officers." ROBERT A. THEOBALD, *THE FINAL SECRET OF PEARL HARBOR* 160 (1954)(emphasis added); PHA 3, at 1451.

⁶⁷*E.g.*, LOUIS SMITH, *AMERICAN DEMOCRACY AND MILITARY POWER* 50, 128, 133 (1951)(During World War II, FDR "exercised in full the authority of naming military commanders and left them in no uncertainty as to the source of their authority." Demonstrating his understanding of the Commander in Chief's personal power to reassign individual officers, FDR at one point threatened to send dissident officers to Guam.) .

⁶⁸THE FEDERALIST No. 69, at 465 (Alexander Hamilton)(Jacob E. Cooke ed., 1961).

where the blame lay, no armed force should remain under the command of a leader under whom it had suffered such a loss.⁶⁹

Even Kimmel's counsel, Edward B. Hanify, cited approvingly the comments of Admiral William H. Standley, a member of the Roberts Commission: "under the circumstances Admiral Kimmel and General Short had to be relieved of their commands."⁷⁰

Due Process and Right to Rank or Office

The President's constitutional power to relieve Kimmel and Short, causing their reversion to the grades of Rear Admiral and Major General, did not "trump" individual rights possessed by the commanders. Complementary to the President's power was the commanders' absolute lack of rights to their ranks or their offices. Kimmel and Short advocates have alleged repeatedly that the commanders were denied due process. The Due Process Clause does not apply whenever prejudicial action is taken against an individual; instead, it applies only when a "life, liberty or property" interest recognized by the Constitution is affected. No military officer has a constitutional due process interest in his rank or office.

Before measuring government action against Kimmel and Short against the requirements of the Fifth Amendment Due Process Clause, the threshold question must be asked whether the protections of the Bill of Rights apply to members of the military at all. As surprising as the question might seem, the answer is even more surprising. The traditional view stated by the Supreme Court was that the Bill of Rights did *not* apply, that Congress determined the rights and responsibilities of service members pursuant to its Constitutional power "To make Rules for the Government and Regulation of the land and naval Forces."⁷¹ Commentators have noted the long

⁶⁹J. O. RICHARDSON, ON THE TREADMILL TO PEARL HARBOR, THE MEMOIRS OF ADMIRAL JAMES O. RICHARDSON, AS TOLD TO VICE ADMIRAL GEORGE C. DYER, USN (RETIRED) 455 (1973). Cf. Greer v. Spock, 424 U.S. 828, 840 (1976)("[N]othing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of the troops under his command.").

⁷⁰E.g., Edward B. Hanify (Ropes & Gray) memo for DIRNAVHIST (OP-09BH) of 23 Dec 87, quoting from HUSBAND E. KIMMEL, ADMIRAL KIMMEL'S STORY 143-44 (1955). Admiral Standley's quoted statement continued that he, Admiral Standley, regretted that Admiral Kimmel "had to go," praising the "state of efficiency" of the fleet. Praise of the post-disaster "state of efficiency" of the fleet, however, is not a comment on the quality of Admiral Kimmel's decision-making on how to employ the fleet before the attack. Instead, the statement tends to indicate, more tragically, that the fleet was equipped, trained and ready to undertake whatever orders Kimmel might have issued, focusing inquiry on the high-level command decisions that led to the fleet being in-port on Sunday, December 7th, in, essentially, a routine, peace time readiness posture.

⁷¹U.S. Const. art. 1, § 8. E.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 138 (1866)("[T]he power of Congress, in the government of the land and naval forces, . . . is not at all affected by the fifth or any other amendment."); *Swaim v. United States*, 28 Ct. Cl. 173, 217 (1893), *aff'd* 165 U.S. 553 (1897)("When a person enters the military service, whether as officer or private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights.").

tradition of this basic tenet in the federal courts.⁷² As if struggling with an uneasy conscience over this principle, the Supreme Court has made great efforts to justify the attenuation of rights in the military on the basis of the unique need for discipline in the military and the fundamental dissimilarity of military culture from civilian society—the so-called “separate community” doctrine.⁷³ In recent cases the Court has not stated specifically that the Bill of Rights does not apply, but it holds repeatedly that the rights of service members are different, and it defers to the judgment of Congress and the President.⁷⁴ The ultimate question is still open,⁷⁵ but the enactment of statutory provisions that provide many constitutional-equivalent protections has largely mooted it.⁷⁶

⁷²E.g., Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT. L. REV. 265, 269 (1994)(“Intense debate has continued over the applicability of the Bill of Rights to individual members of the military.”); Hon. Walter T. Cox III, *The Army, the Courts, and the Constitution: the Evolution of Military Justice*, 118 MIL L. REV. 1, 15-16, 23 (1987)(As late as 1957-58 we were still debating whether military members enjoyed the protections of the Bill of Rights at courts-martial.); JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE* 114-15 (1974)(historical inapplicability of the Bill of Rights in the military context); LAWYER'S COOP. PUB. CO., *MILITARY JURISPRUDENCE* 35-36 (1951)(digest of cases holding the amendments to the Constitution inapplicable at courts-martial).

⁷³E.g., *Parker v. Levy*, 417 U.S. 733, 743, 758 (1974)(“This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)(“The military constitutes a specialized community governed by a separate discipline from that of the civilian.”); *Carter v. McLaughrey*, 183 U.S. 365, 390 (1902)(Members of the military belong to a “separate community recognized by the Constitution.”). See James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. REV. 177, 178 (1984).

⁷⁴E.g., *Weiss v. United States*, 510 U.S. 163, 177 (1994)(“The Constitution contemplates that Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment.’” (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983))); *Solorio v. United States*, 483 U.S. 435, 447-48 (1987)(“Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military We have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated.”); *Burns v. Wilson*, 346 U.S. 137, 140 (1953)(“[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty”). See Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 565 (1994)(“Differences in constitutional rights between the armed forces and civilian society have existed from the days of the Revolutionary War, through the formation of the Constitution, to the present. Throughout our history, members of the armed forces have been subjected to controls and regulations that would not have been tolerated in civilian society.”).

⁷⁵E.g., *United States v. Lopez*, 35 M.J. 35, 41 (C.M.A. 1992)(“[T]he Supreme Court has never expressly applied the Bill of Rights to the military”). But see *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960)(first case in which the United States Court of Military Appeals held that the Bill of Rights does apply, “except those which are expressly or by necessary implication inapplicable”).

⁷⁶See Hon. Walter T. Cox III, *The Army, the Courts, and the Constitution: the Evolution of Military Justice*, 118 MIL. L. REV. 1, 28 (1987)(discussing constitutional concepts in the *Uniform Code of Military Justice* (enacted 1950) and the many amendments enacted after the Vietnam War.).

The applicability of the Due Process Clause to administrative actions taken in the 1940's against Kimmel and Short is not an open question. In three precedential cases involving prejudicial administrative action against military officers that fell short of ordinary due process standards, the Supreme Court held that the Fifth Amendment Due Process Clause did not impose procedural requirements in the military context.⁷⁷ Moreover, in 1950 in a case in which a *court-martial* had convicted the accused of *murder* and sentenced him to imprisonment, the Supreme Court quashed a fledgling trend among federal courts to apply Fifth Amendment due process standards in habeas corpus review proceedings, holding that "[t]he single inquiry, the test" of the adequacy of courts-martial "is jurisdiction."⁷⁸ If the court-martial had jurisdiction over the offense and the accused, its procedures were inscrutable.⁷⁹ In 1953 the Court suggested in dictum in a court-martial habeas corpus case involving the death penalty that some principles of fundamental procedural fairness derived from the Due Process Clause should apply in review of courts-martial,⁸⁰ but the court affirmed the judgment of the court-martial anyway, deferring to post-trial reviews conducted within the chain of command. The Court has never applied the Due Process Clause to reverse a discretionary military administrative action.⁸¹ If the law in effect through at least 1950 did not recognize civilian-equivalent due process in courts-martial (which could adjudge death sentences), then complaints that due process was not observed in the non-punitive, administrative actions taken with respect to Kimmel and Short certainly fail to state claims based on law. In *Reaves v. Ainsworth* (1911),⁸² the Court's seminal case on due process review of military administrative actions, the Court expressed dismay at the very idea of judicial interference with military administration, holding that review of such actions lay exclusively within the Executive Branch unless Congress had clearly expressed in legislation its intention to allow military members to carry their complaints "over the head of the President."⁸³

⁷⁷*United States ex rel. French v. Weeks*, 259 U.S. 326 (1922); *United States ex rel. Creary v. Weeks*, 259 U.S. 336 (1922); *Reaves v. Ainsworth*, 219 U.S. 296 (1911).

⁷⁸*Hiatt v. Brown*, 339 U.S. 103, 110 (1950).

⁷⁹This holding reinforced a long line of cases restricting reviewability of courts-martial to the single issue of jurisdiction. See *United States v. Newak*, 15 M.J. 541, 552 (A.F.C.M.R. 1982) (listing eighteen Supreme Court cases). The seminal case on the limited reviewability of courts-martial was *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857). See also *Grafton v. United States*, 206 U.S. 333, 345-46 (1907) (review limited to jurisdiction, notwithstanding the existence of other obvious error).

⁸⁰*Burns v. Wilson*, 346 U.S. 137, 142-43 (1953).

⁸¹See Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL L. REV. 1, 39 (1975). In reviewing due process claims in courts-martial, the Court still defers to the procedures provided by Congress without imposing additional requirements based on the Fifth Amendment. E.g., *Weiss v. United States*, 510 U.S. 163, 177 (1994); *Middendorf v. Henry*, 425 U.S. 25, 43-44 (1976) (recognizing the view of Judge Quinn of the Court of Military Appeals that the Bill of Rights applied with equal force to the military, but holding that plaintiffs did not have civilian-equivalent due process rights under the Fifth Amendment); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975).

⁸²219 U.S. 296 (1911).

⁸³219 U.S., 304-06. Judicial reluctance to intervene in military administrative matters continued throughout and beyond the tenures of Kimmel and Short. E.g., *Orloff v. Willoughby*, 345 U.S. 93-94 (1953) ("[J]udges are not

The Due Process Clause in the Fifth Amendment states that "No person shall be . . . deprived of life, liberty, or property, without due process of law."⁸⁴ Assuming, *arguendo*, general applicability of the Due Process Clause to military officers in the era of the Second World War, it is immediately apparent that no aspect of the treatment of Kimmel and Short involved capital punishment (deprivation of "life") and no aspect of their treatment involved imprisonment or involuntary detention (deprivation of "liberty"). Neither commander had any other legally cognizable property or liberty right in his temporary grade or command assignment that could call down the procedural protections of the Due Process Clause.⁸⁵ The Due Process Clause itself does not create the liberty and property interests it protects.⁸⁶ The guarantee of procedural due process does not apply to a "mere subjective expectancy."⁸⁷ Some underlying right established by *other* law must be at stake. Such rights must stem from *independent sources*.⁸⁸ While it is true that the common law of England recognized the existence of a property interest in public office, as an "incorporeal hereditament,"⁸⁹ public office in the United States, including the rank and command position of a military officer,⁹⁰ has never been a personal attribute or species of

given the task of running the Army . . ."); *Covington v. Anderson*, 487 F.2d 660, 664 (9th Cir. 1973)(denying plaintiff's due process claim; holding that military administrative decisions are generally immune from judicial review).

⁸⁴U.S. Const. amend. 5.

⁸⁵*E.g.*, The President "may vacate at any time a temporary appointment in a commissioned grade," and "[t]here are no applicable regulations or directives" to limit the President's exercise of discretion in this regard. *Koster v. United States*, 685 F.2d 407, 411, 231 Ct. Cl. 301, 308 (1982)(citing 10 U.S.C. § 3447(c)(1976), which derived from Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 196, and has been superseded by 10 U.S.C.S. § 603(b)(1997)("temporary appointment . . . may be vacated by the President at any time")).

⁸⁶*Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

⁸⁷*Sims v. Fox*, 505 F.2d 857, 861-62 (5th Cir. 1974).

⁸⁸*E.g.*, *Blackburg v. City of Marshall*, 42 F.3d 925, 936 (5th Cir. 1995).

⁸⁹*E.g.*, I THOMAS M. COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS BY SIR WILLIAM BLACKSTONE (James Dewitt Andrews ed., 4th ed., Chicago, Callaghan & Co. 1899), at 462-64, 464n.1 ("36-38)(offices as incorporeal hereditaments; "Commissions in the Army of Great Britain were allowed to be sold until the privilege was abolished . . . in 1871."). See also *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 253-54 (1839)(Argument of counsel for respondent: Under "the law of the tenure of office in England . . . [o]ffice is . . . an incorporeal hereditament, as a right of way. There is, under the common law, an estate in an office."); *Street v. United States*, 24 Ct. Cl. 230, 247 (1889)(describing officer status in the British military until the 1870's as "an established right, founded on unbroken usage for two centuries . . . and the public regarded . . . [a] commission as . . . well-earned property, lawfully accumulated and possessed of the sanctity of a vested right . . .").

⁹⁰Initial commissioning of an officer, *each promotion*, and particular statutorily specified military positions of "importance and responsibility" require separate Presidential appointments as separate offices of the United States. *Weiss v. United States*, 510 U.S. 163, 170 (1994)(10 U.S.C.S. § 624 (1997) "requires a new appointment by the President, with the advice and consent of the Senate, each time a commissioned officer is promoted to a higher grade."); *United States ex rel. Edwards v. Root*, 22 App. D.C. 419 (1903), *cert. denied*, 193 U.S. 673, *error dismissed sub nom United States ex rel. Edwards v. Taft*, 195 U.S. 195 U.S. 626 (1904)(Promotion is a new appointment and can only be effected by Presidential nomination and Senate confirmation). For a partial list of

property.⁹¹ Each successive rank an officer holds is a separate office of the United States. Courts have held repeatedly that rank and command assignment are not property within the meaning of the Due Process Clause;⁹² because promotion, including posthumous promotion, requires a new

particular military duty assignments that require separate appointment and confirmation, see *Weiss v. United States*, 510 U.S. 163, 171 (1994). *Cf.* 10 U.S.C.S. § 601 (1997)(three- and four-star positions of "importance and responsibility"). All appointments are entirely discretionary with the President; for example, the results of promotion selection boards are advisory only. The President may select for promotion an officer not recommended by a selection board, and he may reject officers a selection board has chosen. 10 U.S.C.S. § 629(a) (1997)("The President may remove the name of any officer from a list of officers recommended for promotion by a selection board."); 41 Op. Att'y Gen. 291 (1956)(President may nominate for promotion to brigadier general an officer not selected for promotion by a statutory selection board: "[T]he President may not be bound in his selection to an officer or group of officers merely because in the opinion of others they are better qualified for promotion. To so hold would be to substitute the judgment of subordinate officers for that of the President and to unduly restrict his constitutional appointive authority."); L. Neal Ellis, *Judicial Review of Promotions in the Military*, 98 MIL. L. REV. 129, 133 (1982)("Selection board determinations are only recommendations to the service secretary who in turn makes recommendations to the President. The President then appoints all officers subject to Senate confirmation."). Officer appointments must be confirmed by the Senate, which has unconstrained discretion to confirm or deny any nomination on any ground it chooses. The Constitution does, however, allow Congress by statutory provision to waive Senate confirmation of particular appointments. U. S. Const. art. 2, § 2 ("Congress may by law vest the Appointment of . . . inferior Officers . . . in the President alone . . ."); *Collins v. United States*, 14 Ct. Cl. 568 (1879)(Military officers are "inferior officers" under the Constitution and Congress may permit the President to appoint them without Senate advice and consent.). The President appointed Kimmel and Short to four- and three-star offices for which appointment power had been vested by statute in him alone. *Supra*, p. 13 nn.40-41. The law applicable to assignments and promotions is founded upon political discretion and seems not to have created a property interest upon which the Due Process Clause may operate.

⁹¹*E.g.*, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 260 (1839)("The tenure of ancient common law offices, and the rules and principles by which they are governed, have no application . . . [T]here is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws.")(Argument of counsel for respondent, at 253-54, adopted by the Court: "There is in this country no estate in any office. Offices are held for the benefit of the community . . ."); EDWARD S. CORWIN, *PRESIDENTIAL POWER AND THE CONSTITUTION* 110-11 (Richard Loss ed., 1976)("[A]ll appointive officials are subject to removal by the appropriate authority . . . there is no 'estate in office.'"); I THOMAS M. COOLEY, *COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS BY SIR WILLIAM BLACKSTONE* (James Dewitt Andrews ed., 4th ed., Chicago, Callaghan & Co. 1899), at 463n.1 (In the United States public offices have always been held at the pleasure of the government and have never been considered property). The Constitution reflects the repugnance of the Founders for titular offices that are personal to the holder and take on the nature of property. The Constitution provides that "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any . . . Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. 1, § 9. In the United States public offices are the "property" of the people.

⁹²*E.g.*, *Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972)(no due process interest in promotion); *Lane v. Secretary of the Army*, 504 F. Supp. 39, 42 (D. Md. 1980)(same); *Arnheiter v. Ignatius*, 292 F. Supp. 911, 920-21 (N.D. Ca 1968), *aff'd sub nom* *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970)(military duty assignment and promotion status do not involve any life, liberty or property rights protected by the due process clause); *Koster v. United States*, 685 F.2d 407, 413, 231 Ct. Cl. 301, 310 (1982)(brigadier general "had no property right in his temporary rank" of major general). See also DAJAG (Admin Law) memo 5800 Ser IMA1156A.92 of 6 Oct 92 (to CINCPACFLT FJA)("[N]o member of the armed forces has a property right in any particular command or duty assignment.").

appointment to a new office, the courts have also held that there is no right to promotion;⁹³ indeed, even continuation in the service in *any* rank or position is a privilege, not a right.⁹⁴ As stated aptly in *Street v. United States*, "The tenure of a military office has been from the foundation of the Government among the frailest known to the law, for it has been subject to the will of the President, and that will has been exercised repeatedly."⁹⁵

Because there is no "property" or "liberty" interest in serving under a particular military appointment or in a particular billet for any particular duration, there is no right to any trial-like hearing to protect or preserve a service member's interest in an appointment or assignment. Where no interest protected by the Due Process Clause is implicated, due process is not due. *Any* internal service procedures prescribed for the relief of officers in command, including the opportunity for officers in command to challenge or comment on such decisions,⁹⁶ exist purely as discretionary measures within the military to ensure that personnel resources are utilized effectively. If such procedures are not followed, the aggrieved party is not the individual commanding officer relieved of his command, but the military institution itself. No service procedures have been prescribed for *summary relief* of an officer in command, nor have any procedures been prescribed for Presidential decisions to relieve officers in command. The commonplace statement that officers serve "at the pleasure of the President" is not a cliché; it is a shorthand statement of a fundamental Constitutional prerogative vested in the President, and it is part of the language of the Presidential commission itself.⁹⁷

⁹³Reaves v. Ainsworth, 219 U.S. 296 (1910); VanderMolen v. Stetson, 571 F.2d 617, 627 (D.C. Cir. 1977); Abruzzo v. United States, 513 F.2d 608, 611 (Ct. Cl. 1975); Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972); Viles v. Claytor, 481 F. Supp. 465, 470 (D.D.C. 1979); Coughlin v. Alexander, 446 F. Supp. 1024, 1026 (D.D.C. 1978). Courts will not order a promotion. *E.g.*, Ewanus v. United States, 225 Ct. Cl. 598 (1980)(court lacks power to order promotion, even if failure to obtain promotion was based on defective information).

⁹⁴*E.g.*, Reaves v. Ainsworth, 219 U.S. 296, 297, 304 (1910)(To petitioner's argument that "his commission in the army constituted property of which to be retired from the army, with pay for life, was a valuable attribute, and of which he could not be deprived without due process of law" the Supreme Court responded that petitioner did not have "any right of property, title or interest in the alleged office."); Crenshaw v. United States, 134 U.S. 99 (1890)(Naval officer has no vested right in his office and may be dismissed from the service without a hearing.); Weeks v. United States *ex rel.* Creary, 277 F. 594, 51 App. D.C. 195 (1922), *aff'd*, United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922)(Military officer has no property or contract right in his office; office is revocable by the sovereignty at will.); Sims v. Fox, 505 F.2d 857, 861-62 (5th Cir. 1974)(no due process property right in continuation of service); Kuta v. Secretary of the Army, No. 76 C 1624, slip op. (N.D.Ill. Aug. 22, 1978)("Service in the armed forces is a privilege and not a right.").

⁹⁵24 Ct. Cl. 230, 247 (1889).

⁹⁶*E.g.*, such as those in current MILPERSMAN 3410105 (detachment for cause and relief of command).

⁹⁷See Orloff v. Willoughby, 345 U.S. 83, 91 (1953)("The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor and abilities' of the appointee he is named to the specified rank during the pleasure of the President."). Admiral Kimmel's regular commission as a Rear Admiral, signed for President Roosevelt by Secretary of the Navy Claude Swanson, states that "This Commission to continue in force during the pleasure of the President of the United States for the time being." Form N.Nav.239, executed 7 Dec 37, effective from 1 Nov 37, in the official service record of Husband E. Kimmel.

Due Process and Investigations⁹⁸

Advocates for Kimmel and Short consider the Roberts Commission Investigation the supreme evil among the host of alleged wrongs done to the commanders.⁹⁹ They assert that Kimmel and Short were entitled to a formal investigation that accorded them the rights of parties: to be present throughout proceedings, to call their own witnesses, to cross-examine, to testify or not, and to be represented by counsel.¹⁰⁰ In this point of view the President's access to information about the responsibility of his subordinates must be teased out through something that looks like litigation. As authorized, the Roberts Commission conducted an "informal" investigation, one in which the body appointed to provide advice to the convening authority runs the investigative process without interference from adversarial parties. The President had charged the Roberts Commission by formal executive order on December 18, 1941, to conduct an investigation and advise "whether any derelictions of duty or errors of judgment on the part of United States Army or Navy personnel contributed to such successes as were achieved by the enemy . . . , and if so, what these derelictions or errors were, and who were responsible therefor."¹⁰¹ The focus of complaint against the Roberts Commission has been the single dereliction of duty finding in the final report submitted to the President:

[I]t was a dereliction of duty on the part of each of them [Kimmel and Short] not to consult and confer with the other respecting the meaning and intent of the warnings, and the appropriate measure of defense required by the imminence of hostilities.¹⁰²

⁹⁸Figure 1, adapted from the *Dorn Report (Staff Study)*, shows the dates of the various investigations of the Pearl Harbor disaster, leading up to the Joint Congressional Committee (JCC) investigation in 1945-46 (PHA).

⁹⁹E.g., *Thurmond Hearing*, at 18 (Edward Kimmel: "[N]o weight can be given to the findings of the Roberts Commission, yet its dereliction of duty charge is the genesis of injustice done to Admiral Kimmel."); Edward R. Kimmel & Thomas K. Kimmel ltr of 11 May 88, at 2 (to SECNAV William Ball) ("The proceedings of the Roberts Commission were a travesty of justice . . . the Robert's [sic] Commission convicted him [Admiral Kimmel] without a trial on secret evidence, withheld from him and the public, and published the findings to the world."); Edward B. Hanify (Ropes & Gray) memo for DIRNAVHIST (OP-09BH), of 23 Dec 87, at 6 ("a travesty of justice"); Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 156. Members of the Roberts Commission included Supreme Court Justice Owen Roberts, a former Chief of Naval Operations, a former CominCh/CinCPac, a retired major general and a brigadier general.

¹⁰⁰E.g., Edward R. Kimmel and Thomas K. Kimmel memo for DIRNAVHIST (OP-09BH) of 23 Dec 87, at 5. See NAVAL COURTS AND BOARDS 357, ¶ 734 (1937)(rights of "parties" at courts of inquiry).

¹⁰¹PHA 7, at 3285; PHA 23, at 1247. Apparently finding no dissonance with this executive order, Congress speedily granted the Commission power to summon witnesses and examine them under oath. *Id.* The convergence of the President's extensive supervisory powers as Commander in Chief, and Congress's "broad and sweeping," even "plenary" power to "make Rules for the Government and Regulation of the land and naval Forces" puts the Roberts Commission investigation on unimpeachable constitutional footing. *United States v. O'Brien*, 391 U.S. 367, 377 (1968), *United States ex rel. Creary v. Weeks*, 259 U.S. 326, 343 (1922).

¹⁰²PHA 7, at 3299; PHA 16, at 2265.

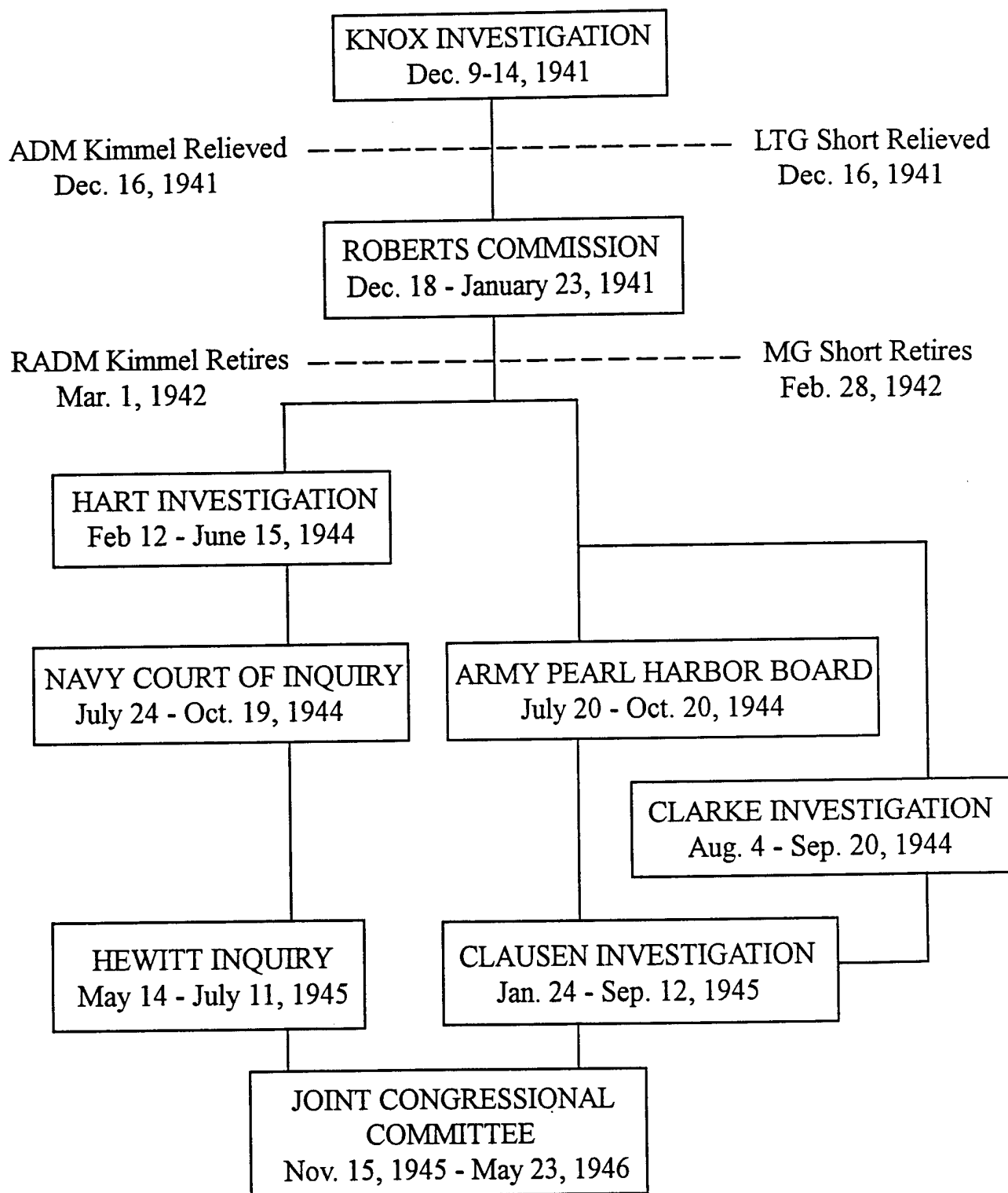


Figure 1
Chronology

Kimmel and Short advocates maintain that this finding condemned the commanders to "stigma and obloquy,"¹⁰³ for which the apology of posthumous promotion is now due.

Kimmel's and Short's problems with investigations did not begin with the Roberts Commission's finding of dereliction of duty. Kimmel and Short helped lay the groundwork for all later findings against them during Secretary Knox's investigation, the first investigation after the disaster, conducted from December 9-14, 1941. As Secretary Knox reported to the President upon his return from Pearl Harbor:

The Japanese air attack on the island of Oahu on December 7th was a complete surprise to both the Army and the Navy. Its initial success, which included almost all the damage done, was due to a lack of a state of readiness against such an air attack, by both branches of the service. *This statement was made by me to both General Short and Admiral Kimmel, and both agreed that it was entirely true. There was no attempt by either Admiral Kimmel or General Short to alibi the lack of a state of readiness for the air attack. Both admitted they did not expect it, and had taken no adequate measures to meet one if it came. Both Kimmel and Short evidently regarded an air attack as extremely unlikely* There was evident in both Army and Navy only a very slight feeling of apprehension of any attack at all, and neither Army nor Navy were in a position of readiness because of this feeling. The loss of life and the number of wounded in this attack is a shocking result of unpreparedness.¹⁰⁴

Kimmel and Short had no right to determine the manner in which the President could seek information and advice, the scope of his quest, nor whether the Secretary of the Navy and the Roberts Commission could advise the President as they did. Moreover, they had no right to avoid exposure of actions they did and did not take in the execution of *public office*, or to determine the manner in which such exposure might be made. The exposure of officers in command to the powers of inspection and investigation held by their superiors in the chain of command, and the vulnerability of officers in command to disgrace for military failure, have always been a feature of military command.¹⁰⁵

¹⁰³E.g., *Thurmond Hearing*, at 17, 19 (Edward Kimmel: "stigma and obloquy"), 18-19 (Edward Kimmel: The Roberts Commission's finding of dereliction of duty "captured the headline of every newspaper in the United States"), 56 (Edward B. Hanify: the "smirch of delinquency" on Kimmel's reputation); Edward R. Kimmel ltr of 23 Oct 91 (to CNO, Kelso)("We are merely seeking to have erased the stigma and obloquy stemming from a baseless and irresponsible charge of 'dereliction of duty.'"); Senators Strom Thurmond, Joseph R. Biden, Jr., John McCain, William V. Roth, & Alan Simpson ltr of 17 Oct 91 (to the President)("the stigma and obloquy associated with the charge by the Roberts Commission . . . this charge was widely publicized.").

¹⁰⁴PHA 5, at 2338, 2342, 2345 (Knox Report read into testimony); PHA 24, at 1749, 1753, 1756 (Knox Report as Exhibit 49 before the Roberts Commission). See *infra*, p. 88, n.419 (*res gestae*).

¹⁰⁵See, e.g., WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 518-20 (2d ed. 1920)(listing scores of famous investigations into military failures, defeats, capitulations, and scandals, focusing on responsible officers in command).

The President possesses inherent power to inspect and monitor his own branch of government. Government would grind to a halt if information about important events, including "feedback" information on the function and failure of government institutions, including the performance of appointed officials, could only be collected and reported through trial-like procedures.¹⁰⁶ As a practical matter, supervisors in both military and civilian settings must be able to question subordinates about work-related issues without resort to cumbersome, formal "due process" procedures.¹⁰⁷ The Executive Branch has long conducted investigations into incidents and irregularities involving federal agencies and officials. In both military and civilian governmental settings, institutional introspection through investigations and inspections is necessary to ensure governmental efficiency and to guide personnel decisions.¹⁰⁸ The public would be seriously disserved if government were not introspective. Consistent with these practical considerations, the President and his designated civilian deputies have unique constitutional investigative powers inherent in the Executive power itself and *not* dependent upon the various statutory investigative powers provided by Congress in military codes.¹⁰⁹ The President has authority to "inspect and control" *individual* subordinate executive officers;¹¹⁰ the

¹⁰⁶See, e.g., *Womer v. Hampton*, 496 F.2d 99 (5th Cir. 1974)(discussion of panel investigation into irregularities in performance of Army Corps of Engineers supervisory inspector).

¹⁰⁷See 496 F.2d 99, at 104, 107.

¹⁰⁸E.g., EDWARD M. BYRNE, *MILITARY LAW: A HANDBOOK FOR THE NAVY AND MARINE CORPS* 250-51 (1970)(Administrative fact-finding bodies are necessary for "efficient command or administration." Investigations provide convening and reviewing authorities with "information essential to the efficient operation and readiness of the fleet or to improve some facet of administration For example, they may become the bases for . . . personnel determinations.").

¹⁰⁹Congress enacted the *Articles for the Government of the Navy*, the *Articles of War*, and the *Uniform Code of Military Justice*, all including powers of investigation, under its authority "to make Rules for the Government and Regulation of the land and naval forces." U.S. Const. art. 1, § 8. See *Martin v. Mott*, 25 U.S. (12 Wheat) 19 (1827)(President has inherent authority as Commander in Chief to develop a common law of military disciplinary procedures in cases not provided for by Congress). Military justice investigations are discussed *infra*, at pp. 29-30.

¹¹⁰11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789 (Charles Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds. 1992), at 846 (Madison: "inspecting and controuling" subordinate officers among the powers of the President); 854-55 (Madison: "[N]o power can be more completely executive than that of appointing, inspecting and controuling subordinate officers."); S. DOC. NO. 6, 103d Cong., 1st Sess., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 559 (1996)(During debates in the First Congress in 1789, James Madison asserted that it was "the intention of the Constitution . . . that the first magistrate should be responsible for the executive department," a responsibility that carried with it, he held, "the power to 'inspect and control' the conduct of subordinate executive officers."). See 1 *ANNALS OF CONG.* 495, 499 (Joseph Gales ed., 1789). See also, *PRESIDENTIAL POWER AND THE CONSTITUTION, ESSAYS BY EDWARD S. CORWIN* 87 (Richard Loss ed., 1976)(President's authority to "inspect and control" the conduct of all subordinate executive officers).

power to gather information relating to administration of executive agencies;¹¹¹ and the power to gather information to support effective exercise of the Commander in Chief power.¹¹²

The need to investigate operational military failures is even more compelling than the practical need for investigations in the federal civilian realm. The military environment involves lethal forces that pose grave dangers to individuals and to national security. A system that denied a military commander the opportunity to dispatch patrols to a failed front to gather information quickly on the demise of his forces would be unimaginable. The fundamental principle does not change because the commander is the President and the enemy's blow fell upon the dignity of flag and general officers.

The President, the Secretary of Defense, and the Secretaries of the Military Departments are courts-martial convening authorities.¹¹³ As such, they have unique authority and responsibility related to the investigation and disposition of suspected military offenses.¹¹⁴ Preliminary military justice investigations, like other law enforcement investigations, are informal and the commander may employ the investigative services of third parties, to include individuals or groups, or established organizations such as the Army's Criminal Investigation Division (CID), the Air Force's Office of Special Investigations (OSI) or the Naval Criminal Investigative Service (NCIS).¹¹⁵ As court-martial convening authorities, the President and the Secretaries of the

¹¹¹*E.g.*, *Independent Meat Packers Assoc. v. Butz*, 395 F. Supp. 923, 931-32 (D. Neb.), *rev'd on other grounds*, 526 F.2d 228 (8th Cir. 1975), *cert. denied* 424 U.S. 966 (1976)(Article II, section 3 of the Constitution, "by necessity, gives the President the power to gather information on the administration of executive agencies.").

¹¹²*E.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953)(Before reposing his confidence in an officer, the President "has the right to learn whatever facts the President thinks may affect his fitness."). *Cf.* Military Rule of Evidence (MRE) 313, MCM (1995)(recognizing inspection as an incident of command, exempt from the Fourth Amendment, based on a commander's inherent authority to determine the health, welfare, military fitness, good order, discipline and readiness of subordinates within his command).

¹¹³10 U.S.C.S. § 822(a) (1997)(UCMJ art. 22(a)). The law in 1941 also specified that the President and the Secretaries of the Navy and of War were convening authorities. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 38 (1930), *reproduced in* NAVAL COURTS AND BOARDS 465, ¶ B-40 (1937)("General courts-martial may be convened . . . by the President, the Secretary of the Navy . . ."); LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 17 (1942).

¹¹⁴MANUAL FOR COURTS-MARTIAL (MCM)(1995), RCM 303, at II-20 (On the commander's preliminary inquiry: "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."). *See also* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 5.1 (3d ed. 1992), at 192 ("In almost all cases the disposition of a suspected offense begins with an investigation by the commander . . .").

¹¹⁵MANUAL FOR COURTS-MARTIAL (MCM)(1995), RCM 303 (Discussion), at II-20 ("The preliminary inquiry is usually informal" and the commander may seek the assistance of third parties to conduct the inquiry.). Nearly identical provisions appeared in the first *Manual for Courts-Martial* promulgated after enactment of the UCMJ. MANUAL FOR COURTS-MARTIAL (MCM)(1951), ¶ 32b, at 36. *See also* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 5.2 (3d ed. 1992), at 192 (On the commander's preliminary investigation: Information that an offense might have been committed may come from formal or informal sources; the

services are entitled to investigate subordinate officers suspected of offenses under the same legal principles that support investigations of the most junior personnel by their respective military commanders. There is not one law of military justice for flag and general officers and another for soldiers and seamen.

Among the offenses triable by courts-martial are many unique "employment-related" failures alien to the civilian setting, such as disobedience of orders, dereliction of duty, and improper hazarding of a vessel. These are criminal offenses under military law and may be investigated under the same juridical principles that govern law enforcement investigations for homicide, larceny, or any other offense. Informal military justice investigations, like civilian law enforcement investigations, need not be conducted using trial-like procedures that afford the rights of a "party" to individuals involved in an incident under investigation. A law enforcement investigation typically does not include the active participation of suspects at each step of the investigation, including each witness interview. Yet military and civilian law enforcement investigations may result in the opinion that offenses have been committed, and in arrests or other legal process. In furtherance of their law enforcement duties, courts-martial convening authorities at all levels of the chain of command routinely direct that administrative investigations of military failures specifically address culpability for offenses.¹¹⁶ Moreover, persons appointed to conduct investigations that involve possible military offenses may include *specific proposed charges* and specifications with the final report forwarded to the convening authority.¹¹⁷

The President, who is also the Chief Executive of the Justice and Treasury Departments and all of their law enforcement agencies, would have reason to be familiar with the constitutional scope of his law enforcement investigative powers, powers which derive from a separate specific clause in Article 2 of the Constitution.¹¹⁸ Such powers exceed anything delineated in service regulations.

The commission form of investigation chosen by President Roosevelt to inquire further into responsibility at Pearl Harbor was not inappropriate or unlawful. Presidents have long used

commander may investigate personally or direct a third party to "gather more information and make a report." The investigation may include searches or seizures or "personal interrogation of a suspect or an accused.").

¹¹⁶*The Manual of the Judge Advocate General*, Department of the Navy [hereinafter *JAG Manual*] (JAGINST 5800.7C, CH-2 (1995)), contains examples of informal investigation convening orders, specifically providing for findings and recommendations on disciplinary matters; for example: "Investigate the cause of the [mishap], resulting injuries and damages, and any fault, negligence, or responsibility therefor, and recommend appropriate administrative or disciplinary action." *JAG Manual*, at A-2-c.

¹¹⁷See *JAG Manual*, at A-2-c ("If an investigating officer recommends trial by court-martial, a charge sheet drafted by the investigating officer may be prepared and submitted to the convening authority with the investigative report.").

¹¹⁸U.S. Const. art. 2, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . ."). An entire, separate jurisprudence exists on this single clause and the law enforcement powers it confers.

ad hoc commissions to conduct informal investigations of military and other matters,¹¹⁹ including, for example, the "Dodge Commission" appointed by President William McKinley to investigate the War Department and the Secretary of War,¹²⁰ the "Holloway Commission" appointed to investigate the failed Iranian hostage rescue mission,¹²¹ and the "Long Commission" to investigate the bombing of the Marine Barracks in Beirut in 1983.¹²² Deflecting Congressional criticism of his frequent use of ad hoc commissions, Theodore Roosevelt asserted, "Congress cannot prevent the president from seeking advice."¹²³ Congress has in fact *facilitated* ad hoc advisory commissions by passing enabling legislation and providing funding.¹²⁴ This legislation, the *Federal Advisory Committee Act*, requires public access to the proceedings and reports of advisory commissions, absent special national security justification for secrecy.¹²⁵ President Roosevelt's decision to publish the findings of the Roberts Commission¹²⁶ was not unusual or unlawful.

¹¹⁹*E.g.*, EDWIN S. CORWIN, *PRESIDENTIAL POWER AND THE CONSTITUTION* 74 (Richard Loss ed., 1976)(discussing the established use of ad hoc investigative commissions by presidents before Franklin Roosevelt, particularly John Tyler, Theodore Roosevelt and Herbert Hoover). The "Downing Commission" investigation is the most recent ad hoc executive commission investigation of a military disaster. *See, e.g.*, Remarks on American Security in a Changing World at George Washington Univ., 32 WEEKLY COMP. PRES. DOC. 1404 (Aug. 5, 1996)(President Clinton: "After Khobar Towers, I immediately ordered investigations by the FBI and a commission headed by General Wayne Downing [USA, Ret.] . . ."); Art Pine, *Panel Cites Broad Security Failures in Saudi Bombing . . . Commanders Failed to Respond Adequately to Warnings*, L.A. TIMES, Sept. 17, 1996, at A1 (reporting key findings of the "Downing Commission" in its investigation of the Khobar Towers bombing in Dharan, Saudi Arabia). The Downing Commission's report focused particularly on failings attributable to the U.S. Central Command and Air Force Brigadier General Terry Schwalier, commander of U.S. forces at Dharan at the time of the bombing on June 25, 1996.

¹²⁰*E.g.*, WARREN W. HASSLER, JR., *THE PRESIDENT AS COMMANDER IN CHIEF* 83 (1971)(The "Dodge Commission" focused on inefficiency and negligence of Secretary Russel A. Alger. McKinley dismissed Alger from office as a result.).

¹²¹SPECIAL OPERATIONS REVIEW GROUP, *RESCUE MISSION REPORT* (August 1980)(final report of the "Holloway Commission," appointed in May 1980)(available in one bound volume in the Pentagon Army Library).

¹²²REPORT OF THE DoD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCT. 23, 1983 (Dec. 20, 1983)(final report of the "Long Commission," appointed on Nov. 7, 1983—the commission found fault up and down the USCINCEUR chain of command, and particularly with two on-scene commanders.).

¹²³PRESIDENTIAL POWER AND THE CONSTITUTION, *ESSAYS BY EDWARD S. CORWIN* 74 (Richard Loss ed., 1976).

¹²⁴Federal Advisory Committee Act (FACA), P.L. 92-463, Oct. 6, 1972, 86 Stat. 770 (codified at 5 U.S.C.S. app. §§ 1-15 (1997))(establishing a system governing the creation and operation of advisory committees in the Executive Branch). 5 U.S.C.S. app. § 1(a) (1997) refers approvingly to "numerous committees, boards, commissions, councils and similar groups . . . established to advise officers and agencies in the executive branch," finding such bodies "a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." The report of the Long Commission specifically cited FACA as authority.

¹²⁵5 U.S.C.S. app. § 10 (1997).

¹²⁶PHA6, at 2494; PHA7, at 3262.

Thousands of informal, administrative investigations are conducted yearly throughout the military.¹²⁷ In the Navy, the single-officer "*JAG Manual* investigation" is the format used most frequently to investigate mishaps.¹²⁸ Informal, single-officer *JAG Manual* investigations often find fault and recommend disciplinary action against individuals, without having observed formal, "due process" procedures.¹²⁹ Army regulations also provide for informal administrative investigations. As stated pointedly in Army Regulation 15-6:

Appointing authorities have a right to use investigations and boards to obtain information necessary or useful in carrying out their official responsibilities. The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual.¹³⁰

The principal in an administrative investigation is the commander who seeks information to support decision-making, not a subordinate who happens to be involved in the incident of interest. Investigations do not form legal judgments of responsibility. They make non-binding recommendations to the convening authority.¹³¹

Congress also frequently conducts investigations that do not afford formal "due process" rights to individuals, and the courts have agreed that such rights need not be provided.¹³²

¹²⁷The *JAG Manual* lists seven types of administrative investigations in addition to the standard accident/incident "*JAG Manual* investigation," including "situation reports" required by Navy Regulations and other sources of authority; inspector general investigations; aircraft accident investigations; security violation reports; safety investigations; Naval Criminal Investigative Service investigations; and investigations of allegations of personal misconduct by senior officials. *JAG Manual*, par. 0202c, at 2-5 (1995).

¹²⁸In accordance with current Navy JAG Instruction 5830.1, and the *JAG Manual*, par. 0205, at 2-7, courts of inquiry are the preferred format for investigating major incidents. However, the convening authority and the next superior in the chain of command, may, in their discretion, determine that a court of inquiry is not warranted. *Id.* The principal source of authority for "informal," single-officer investigations in the Army is AR 15-6 (11 May 88).

¹²⁹*E.g.*, EDWARD M. BYRNE, *MILITARY LAW: A HANDBOOK FOR THE NAVY AND MARINE CORPS* 251 (1970) ("Fact-finding reports may provide information which is useable in connection with various personnel actions arising out of the conduct or performance of individuals, such as . . . disciplinary actions, and other administrative actions."). A recent example of a well known career-ending informal investigation is the investigation into the attack on U.S.S. *Stark* in the Persian Gulf in 1987. Rear Admiral Grant Sharp ltr 5102 Ser 00/S-0487 of 12 Jun 87 (recommending detachment for cause and disciplinary action against the Commanding Officer, Executive Officer and Tactical Action Officer on watch at the time of the attack).

¹³⁰AR 15-6 (11 May 88), par. 1-6.

¹³¹*E.g.*, EDWARD M. BYRNE, *MILITARY LAW: A HANDBOOK FOR THE NAVY AND MARINE CORPS* 250 (1970) ("The primary purpose of all administrative fact-finding bodies is to provide convening and reviewing authorities adequate information upon which to base decisions in the matters involved. These bodies are not judicial. Their reports are purely advisory and their opinions, when expressed, do not constitute final determinations or legal judgments. Their recommendations, when made, are not binding upon convening or reviewing authorities.").

¹³²*E.g.*, *Hannah v. Larche*, 363 U.S. 420, 443-45 (1960); *United States v. Fort*, 443 F.2d 670, 679 (D.C. Cir. 1971) (Congressional investigations are not criminal trials, and are therefore "outside the guarantees of the due

Congressional investigations in particular have focused on military and national security failures,¹³³ and have made political spectacles of individual military officers.¹³⁴ The Courts

process clause of the Fifth Amendment and the confrontation right guaranteed in criminal proceedings by the Sixth Amendment.”). See, e.g., ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 284, 287, 289, 296 (reprint 1973)(1928)(Congress does not follow principles of courts of law in conducting investigations; the Bill of Rights does not apply; hearings may be public or secret); JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 244-72 (1976)(Rights of witnesses are those granted in House and Senate rules; no right to confront witnesses or cross-examine them; no right to call one's own witnesses; rules of evidence do not apply). Witnesses before Congressional investigations not only have no right to examine other witnesses, but they are routinely compelled to give self-incriminating testimony. See TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 193-95 (reprint 1974)(1955)(Because it has never been conclusively resolved whether the Fifth Amendment privilege against self-incrimination applies to witnesses before Congressional investigations [because an investigation is not a "criminal case," in the language of the Fifth Amendment], the practice evolved of merely granting testimonial use immunity and ordering testimony.). There is no right to avoid embarrassment or stigma by asserting a Fifth Amendment privilege against self-incrimination before a Congressional investigation after being immunized from criminal prosecution and then ordered to testify. See *Kastigar v. United States*, 406 U.S. 441 (1972). Failure to testify after being immunized is punishable as a contempt. See S. DOC. NO. 6, 103d Cong., 1st Sess., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 103-05 (1996).

¹³³TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 33-34 (reprint 1974)(1955)(Historically, Congressional investigations have focused on military operations); LOUIS SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 176-78 (1951)(By 1951 Congress had conducted over 100 investigations involving the military departments and the armed forces.). See also 3 ANNALS OF CONG. 490-94 (1792)(The first Congressional investigation involved the disastrous defeat of Army forces by Indians in the Ohio Territory).

¹³⁴See, e.g., TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 13-28 (reprint 1974)(1955)(Congressional investigation of defeat of forces commanded by Major General Arthur St. Clair). President Washington dispatched St. Clair's expedition to subdue Indians that had been preying on settlers in the Ohio Territory. General St. Clair was governor of the Ohio Territory and used some of his own resources to outfit the expedition. In a battle along the Wabash River, St. Clair lost half his army in three hours and his retreat turned into a rout. The incident inflamed the public against St. Clair, who claimed that he had been inadequately equipped for the expedition, with respect to both men and material. The House of Representatives appointed a select committee to investigate the incident on March 27, 1792. Before the investigation began, Jeffersonian Democrats began using the disaster as a whip against the incumbent Federalists. The politicized investigation raised many issues but failed to reach conclusions or take action. St. Clair's hope for exoneration was dashed. The incident haunted St. Clair for the rest of his life and he died under impoverished conditions due to Congressional hesitation to reimburse him for his expenses. The whole St. Clair affair became entangled in Federalist/Antifederalist politics and St. Clair "was left accused but unjudged."

More recently, Rear Admiral John Poindexter and Lieutenant Colonel Oliver North were called as witnesses during hearings on the so-called "Iran-Contra Affair" in 1987. When they asserted their Fifth Amendment rights against self-incrimination, Congress compelled their testimony by a grant of use immunity. The testimony of North and Poindexter was carried live on national television and radio, replayed on news shows, and analyzed in the public media. The hearings focused on fixing individual responsibility, and were fraught with political controversy over the Reagan Administration's policy in Central America. Moreover, in December 1986, the President had already appointed a non-due process ad hoc advisory commission, the "Tower Commission," to investigate the Iran-Contra allegations. See *Report of the Congressional Committee to Investigate Covert Arms Transactions with Iran*, H.R. REP. NO. 100-433, S. REP. NO. 100-216, 100th Cong., 1st Sess. (1987); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *United States v. Poindexter*, 698 F. Supp. 300 (D.D.C.), *appeal dismissed*, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). In

continue to recognize that authority to conduct "non-due process" investigations inheres in Congress's constitutional powers.¹³⁵ That Congress should have such power over agents of the Executive Branch and the President lack a similar power within his own sphere is too dissonant with the constitutional separation of powers principle to merit serious consideration.

The Roberts Commission investigation and the various single-officer investigations in the Pearl Harbor case (e.g., Hart, Hewitt, Clausen) are not extraordinary among the thousands of investigations conducted within the Executive Branch every year. Persons interviewed in the course of such investigations, including witnesses and potential suspects, are routinely not allowed to cross-examine witnesses, to demand the inclusion of specific evidence, to inspect other evidence collected during the investigation, or to comment thereon. A convening authority may use a formal, due-process method to investigate an incident, but he is not required to do so until he has decided to initiate the process that leads to a general court-martial.¹³⁶ Before enactment of the *Uniform Code of Military Justice* in 1950 a convening authority could proceed directly to a general court-martial without ever having conducted a formal investigation.¹³⁷

United States v. Poindexter, the Court stated: "Congress may compel witnesses to testify over their assertion of Fifth Amendment rights . . . , and it may cause a recalcitrant witness to be punished for contempt if this fails. Few formal procedures or evidentiary rules apply during this process. The power to compel testimony in aid of legislative inquiry was assumed to exist by American legislatures even before the Constitution itself was ratified, both Houses of Congress took the same view thereafter, and the Supreme Court has recognized the Constitutionality of this authority . . . sustaining this enormous nonjudicial power in spite of the obvious possibility of abuse." 698 F. Supp. 300, at 304. The Supreme Court precedent that recognized the constitutionality of compelling an immunized witness to testify over his objection is *Kastigar v. United States*, 406 U.S. 441 (1972). See *United States v. Poindexter*, 727 F. Supp. 1488 (1989)(motion to dismiss denied on *Kastigar* grounds). The notion that reputation must be secured from public damage by strictly formal "due process" proceedings when branches of government at the highest levels investigate failures in government operations of national-level concern is a fiction that appears throughout the standing brief of the Kimmel camp, including the brief of counsel Edward B. Hanify, in which appears not one citation to legal authority. Edward B. Hanify (Ropes & Gray) memo for DIRNAVHIST (OP-09BH), of 23 Dec 87.

¹³⁵*McGrain v. Daugherty*, 273 U.S. 135, 177-78 (1927)(ratifying "in sweeping terms" the power of Congress to inquire into the administration of executive departments and to sift charges of malfeasance). For general discussion of the broad investigative powers of Congress, see *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Barenblatt v. United States*, 360 U.S. 109 (1959). See also 9 Op. Off. Legal Counsel 60 (1985)(Congress has broad authority to conduct investigations, as long as it does not usurp executive or judicial functions); 10 Op. Off. Legal Counsel 68, 73-74 (1986)(same).

¹³⁶Today a "formal" method of investigation must precede referral of charges to a general court-martial. RCMs 405(b), 601(d)(2), MCM (1995). The current requirement for a "formal" investigation before charges may be referred to a general court-martial does not preclude the conduct of "informal" investigations. The rule simply provides that an "informal" method of investigation will not support the referral of charges to a general court-martial. On the basis of an "informal" investigation, a convening authority may decide to take no action in a particular case; he may decide to take administrative, non-punitive action, to commence non-judicial punishment procedures under UCMJ article 15, to refer charges to a summary or special court-martial, or to order a UCMJ article 32 investigation with a view toward referral of charges to a general court-martial. See also discussion of general courts-martial under the sub-heading "Courts and Boards of Inquiry and Supplemental Investigations," *infra*, pp. 47-52.

¹³⁷*Humphrey v. Smith*, 336 U.S. 695, 698 (1949).

Justice Roberts compared his commission's investigation to a grand jury investigation.¹³⁸ Grand juries are convened to investigate activity and determine whether criminal charges are warranted.¹³⁹ Grand jury proceedings are conducted in secret; a grand jury may have nearly unlimited investigative powers; representation by counsel has not been established as a right before a grand jury; a grand jury takes evidence in secrecy; no accused has the right to cross-examine grand jury witnesses or to inspect and comment on documentary evidence presented to a grand jury; an indictment based on evidence previously obtained in violation of the Fifth Amendment right against self-incrimination is nevertheless valid;¹⁴⁰ the rules of evidence do not apply at grand jury proceedings; and a grand jury's failure to return an indictment is not preclusive of subsequent attempts to obtain an indictment from other grand juries convened for that purpose.¹⁴¹ These are sweeping, non-due process powers exercised in federal jurisdictions every day. The findings of grand juries are routinely publicized when their investigations are complete. The Roberts Commission investigation does not compare unfavorably to a grand jury investigation—a procedure one might expect a Supreme Court justice to understand, particularly one who had risen to national prominence (before his judicial appointment) as special counsel investigating the Teapot Dome Scandal.¹⁴²

As Justice Roberts stated to Rear Admiral Kimmel and to Congress, his investigation was not a trial.¹⁴³ Due process may be warranted at a trial where life, liberty or property interests protected by the due process clause may be deprived, but the Roberts Commission had no such power.¹⁴⁴ Advisory investigations such as those conducted by Secretary Knox and the Roberts Commission, however embarrassing, are not governed by due process procedures. Reputation is

¹³⁸PHA 7, at 3267 (Justice Roberts testified: "This seemed to me a preliminary investigation, like a grand jury investigation . . .").

¹³⁹Compare the charter of the Roberts Commission—to report responsibility for derelictions. PHA 23, at 1247.

¹⁴⁰See generally *United States v. Calandra*, 414 U.S. 338, 346 (1974); *Lawn v. United States*, 355 U.S. 339, 348-50 (1958); *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966).

¹⁴¹On these broad powers of grand juries, see *United States v. Williams*, 504 U.S. 36, 48-51 (1992); *United States v. Calandra*, 414 U.S. 338, 342-345 (1974).

¹⁴²E.g., Peter G. Fish, *Perspectives on the Selection of Federal Judges*, 77 KY. L. J. 545, 571 (1989).

¹⁴³See Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 156 (carping that the Supreme Court justice had used the term "trial" in its "strictly legalistic sense."); PHA 7, at 3267 (testimony of Justice Roberts).

¹⁴⁴As stated by Admiral Robert Theobald, who assisted Admiral Kimmel as counsel at the Roberts Commission investigation, the commission was "a fact-finding body." ROBERT A. THEOBALD, *THE FINAL SECRET OF PEARL HARBOR* 153-54 (1954). Compare *Arnheiter v. Ignatius*, 292 F. Supp. 911, 923 (N.D. Ca. 1968), *aff'd sub nom* *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970) (Informal investigation into plaintiff's fitness to command "was not a trial," but "an administrative fact-finding investigation designed to provide the convening and reviewing authorities with adequate advisory information upon which to base decisions."). The charter of the Roberts Commission went no further than the provision of information and advice to the President.

not a constitutionally protected interest.¹⁴⁵ The ordinary military commander has no right to enjoin such investigations or to demand remedies from their collateral effects.¹⁴⁶

The findings in the Roberts Commission report are not so outrageous as to indicate a conspiracy by the members of the Commission to protect Washington by singling out Rear Admiral Kimmel and Major General Short as scapegoats, especially in light of Secretary Knox's preliminary report to the President, including admissions of unpreparedness at Pearl Harbor. Advocates for Kimmel and Short have never presented evidence of a conspiracy to frame Kimmel and Short for dereliction as scapegoats to protect the Roosevelt Administration. Advocates for Kimmel and Short do, however, continue to vilify the Roberts Commission's proceedings and its report, comparing the investigation to a trial and conviction without due process, as if the performance of Kimmel and Short were subject to the President's scrutiny only through the stilted medium of lawyers and rules of evidence in an adversarial hearing. Such a relationship between military superiors and subordinates would destroy the chain of command. One can only wonder whether any commanding officer would feel constrained to use such awkward adversarial procedures to apprise himself of the performance of each soldier and seaman assigned to his command, when the law clearly does not require him to do so.

"Dereliction of Duty"

Over the years, advocates of Kimmel and Short have attributed talismanic significance to the phrase "dereliction of duty," used in the report of the Roberts Commission to describe the failure of Admiral Kimmel and Lieutenant General Short "to consult and confer with each other respecting the meaning and intent of the warnings and the appropriate means of defense required by the imminence of hostilities."¹⁴⁷ The Kimmels have referred to this finding as a "charge" and have treated it as an accusation of criminal misconduct, if not a conviction of such conduct, in the

¹⁴⁵See *infra*, pp. 64-65, nn.315-19.

¹⁴⁶*E.g.*, *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970), *aff'g* *Arnheiter v. Ignatius*, 292 F. Supp. 911, 926 (N.D. Cal. 1968)(Court has no jurisdiction to review informal investigation of fitness of officer in command, his relief of command, or his failure to be promoted; nor did the court have jurisdiction to order the Secretary of the Navy to conduct a court of inquiry or other formal hearing into plaintiff's relief from command). Rear Admiral Kimmel complained years after the relevant events that naval regulations called for courts of inquiry in disaster cases. See, e.g., Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 156. Courts of inquiry are still the preferred form of investigation in disaster cases, but the regulations have never precluded other forms of investigation. The traditional preference for courts of inquiry did not create a due process right. See *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986)(The "fatal flaw" in petitioner's due process claim was that he had "no property interest in the regulations governing investigations When a substantive property interest does not independently exist, rules for procedural fairness do not create such an interest [R]egulations designed to assure procedural fairness in investigations do not confer or create a protected property interest."). Moreover, Navy guidance on investigations applies "down," not "up." The President's constitutional authority is not constrained by the Secretary of the Navy's regulations.

¹⁴⁷PHA7, at 3299.

very inscription of the three words in the Commission's report to the President.¹⁴⁸ As a matter of fact, however, the applicable military law in existence in 1941 did not recognize "dereliction of duty" as an offense.¹⁴⁹ It was not until 1950 that Article 92 of the first *Uniform Code of Military Justice* included "dereliction of duty" as a court-martial offense.¹⁵⁰ The applicable military law through 1950 was, for the Army, the *Articles of War*, and, for the Navy, the *Articles for the Government of the Navy*. Under the *Articles for the Government of the Navy*, offenses arising from deficiencies in the performance of duty were chargeable under article 8(9) as "negligence or carelessness in obeying orders" or "culpable inefficiency in the performance of duty."¹⁵¹ Similar offenses under the *Articles of War* would have been charged as violations of the general article, article 96 ("disorders and neglects to the prejudice of good order and military discipline").¹⁵² The fact that "dereliction of duty" was not the language of a statutory court-martial offense in 1941 may not have softened its impact, but it was not the language of an "indictment" prepared to support prosecution.¹⁵³

Admiral King and Secretary Forrestal in their endorsements on the Navy Court of Inquiry, the Army Pearl Harbor Board and Secretary Stimson's final report, and the Joint Congressional

¹⁴⁸E.g., Edward R. Kimmel & Thomas K. Kimmel ltr of 11 May 88 (to SECNAV Ball), at 2 ("[T]he Robert's [sic] Commission convicted him without trial . . .").

¹⁴⁹The press pointed out this fact at the time. See GORDON W. PRANGE, *AT DAWN WE SLEPT* 612 (1981). Subjectivists who claim the power to divine "justice" in these cases by their own lights continue to consider such annoying legal distinctions as clouding the quest for truth with "semantics and legalisms." E.g., Thomas B. Buell, *Memorandum for the Deputy Secretary of Defense: "Advancement of Rear Admiral Kimmel and Major General Short,"* NAVAL INST. PROCEEDINGS, Apr. 1996, p. 98, at 99.

¹⁵⁰U.S. DEPT. OF DEFENSE, *LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1951), ¶ 171, at 258 (discussing UCMJ article 92, MCM (1951) ¶ 171c (dereliction of duty): "As a specific punitive provision, this latter sub-section is new to the Army and Air Force, but has been known to the Navy as neglect of duty . . . and culpable inefficiency in the performance of duty."); Exec. Order No. 10214 (*MANUAL FOR COURTS-MARTIAL, UNITED STATES* (MCM)(1951)), ¶ 171c, at 324—the criminal offense of "dereliction of duty" after 1950 signified willful or negligent failure to perform duties, or performance of duties in a culpably inefficient manner.

¹⁵¹ARTICLES FOR THE GOVERNMENT OF THE NAVY 8(9) (1930); U.S. DEPT. OF DEFENSE, *LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1951), ¶ 171, at 258. See PHA11, at 5495 (unofficial draft court-martial charges and specifications for culpable inefficiency and neglect of duty in the case of Rear Admiral Kimmel).

¹⁵²U.S. DEPT. OF DEFENSE, *LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1951), ¶ 171, at 258 ("Under the present Army and Air Force practice offenses of this nature [i.e., dereliction of duty] would be charged under Article of War 96 The third part [of Article 92, UCMJ (1950)] is directed against any person subject to the code who is derelict in the performance of his duties. As a specific punitive provision, this latter sub-section is new to the Army and Air Force . . ."); LEE S. TILLOTSON, *THE ARTICLES OF WAR ANNOTATED* 206 (1942).

¹⁵³As soon as three days after the Roberts Commission report had been submitted, the press reported that the President did not intend to order courts-martial or take any other action personally. *Inquiry on Hawaii Urged in Congress*, N.Y. TIMES, Jan. 27, 1942, at 4, col. 1.

Committee in its final findings all echoed the key finding of the Roberts Commission, but without the appellation of “dereliction.” Although the Roberts Commission’s report found some fault with the actions of officials in Washington¹⁵⁴ (a fact overlooked by those zealously committed to rehabilitation of Kimmel and Short), the full extent of that fault would not be revealed until later when more time was available for detailed investigation. In this respect, the Roberts Commission, working quickly in the aftermath of the attack without access to highly classified evidence that would later become available, produced a report that addressed its investigative precept, but was not as comprehensive as later investigations. The discovery of additional fault with other officials in later investigations, however, does not indicate that Rear Admiral Kimmel and Major General Short were blameless. Later investigations, including the findings of the Joint Congressional Committee,¹⁵⁵ *added* to the list of faults the Roberts Commission had found with Kimmel and Short, but characterized such faults not as “dereliction” but as failures of judgment.¹⁵⁶ The real significance of *not* characterizing the failings of Kimmel and Short as derelictions in later investigations is not forgiveness but the more damning implication that the commanders lacked capacity to perform at the level expected of them. Capacity wasted in inattention or culpable disregard is the gravamen of dereliction or neglect of duty.¹⁵⁷ Later investigations found, essentially, that the commanders lacked the capacity to be derelict.¹⁵⁸

To whatever extent the findings of the Roberts Commission suggested that the Pearl Harbor commanders committed *criminal* “dereliction” offenses, the findings of the Navy Court of Inquiry, the Army Pearl Harbor Board, together with the endorsements of the Secretaries, and the findings of the Joint Congressional Committee, stand as official “corrections” of the offensive dereliction finding.¹⁵⁹ Kimmel and Short had full opportunities to present their sides of the Pearl Harbor story at these later proceedings and to load the historical record with their versions of the

¹⁵⁴PHA 7, at 3299-3300.

¹⁵⁵*Report of the Joint Committee on the Investigation of the Pearl Harbor Attack, Pursuant to S. Con. Res. 27, 79th Cong.* (Letter of Transmittal from Committee Chairman and Vice-Chairman to Speaker pro tempore of the Senate and Speaker of the House, dated July 16, 1946)[hereinafter “JCC”], at 252.

¹⁵⁶*Infra*, at pp. 50 n.231, 71, 74.

¹⁵⁷*See, e.g.*, MCM (1995), Pt. IV, par. 16c(3)(d)(“Ineptitude. A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished.”).

¹⁵⁸*E.g.*, PHA 16, at 2424, 2425 (ADM King: “lack of superior judgment necessary for exercising command commensurate with their rank and their assigned duties”), 2425-26 (ADM King: “lack of the superior judgment necessary for exercising command commensurate with their responsibilities.”), 2427 (Navy Judge Advocate General: “failed to exercise the discernment and judgment to be expected from officers occupying their positions;” “poor quality of strategical planning”); JCC, at 252 (“errors of judgment and not derelictions of duty”).

¹⁵⁹And it has been the official position of the Navy ever since that “the Navy does not contend that RADM Kimmel was guilty of dereliction of duty.” SECNAV memo for DEPSECDEF of 4 May 95.

facts¹⁶⁰—but neither they nor anyone else in uniform has ever held ultimate power to decide what official conclusions should be drawn from these facts.

Retirement

Advocates of Kimmel and Short have stated on a number of occasions that the commanders were “forced into retirement.”¹⁶¹ The record, however, reflects that both officers were retired pursuant to their own requests. According to his own testimony, Major General Short telephoned General Marshall on January 25, 1942, and asked whether he should retire, to which General Marshall responded, “Stand pat”¹⁶² On his own initiative, Short then prepared a formal application for retirement and forwarded it to General Marshall with a personal letter, stating as follows:

I appreciate very much your advice not to submit my request for retirement at the present time. Naturally, under existing conditions, I very much prefer to remain on the active list and take whatever assignment you think it necessary to give me. However, I am inclosing [sic] application so that you may use it should you consider it desirable to submit it at any time in the future.¹⁶³

General Marshall informed the Secretary of War in writing on January 26 that he had spoken to General Short, that General Short had volunteered to retire, and he recommended to the Secretary that General Short’s application be accepted “quietly without any publicity at the moment.”¹⁶⁴ In the same letter to Secretary Stimson, General Marshall stated further that Admiral Stark had proposed to communicate Short’s request for retirement to Rear Admiral Kimmel, “in the hope that Kimmel will likewise apply for retirement.”¹⁶⁵ On January 25, 1942, the

¹⁶⁰See, e.g., BUPERS memo 5861 PERS-00F of 7 Apr 93 (for PERS-00X)(Kimmel has already had his “day in court” and no action was subsequently taken to promote him on the retired list. “Between December 1941 and January 1946 there were no less than eight different investigations into the facts surrounding the attack on Pearl Harbor. At both a Naval Court of Inquiry and before a Joint Congressional Committee RADM Kimmel was allowed to tell his side of the story. Results of these proceedings are part of the historical record.”).

¹⁶¹E.g., the “Thirty-six Flag Officer Petition,” 22 Oct 91 (to President Bush), at 1 (“Kimmel and Short were forced into retirement.”). Compare this near-proprietary attitude of personal attachment to public office to GEORGE F. MILTON, *THE USE OF PRESIDENTIAL POWER* 112 (reprint 1965)(1944)(“The supremacy of the civil executive must go unquestioned When a President loses confidence in a commander, the latter should resign or be dismissed.”).

¹⁶²PHA7, at 3133.

¹⁶³PHA7, at 3134-35. The enclosed request for retirement stated “I hereby submit my request for retirement . . . , effective upon a date to be determined by the War Department.” *Id.*

¹⁶⁴PHA7, at 3139.

¹⁶⁵*Id.* In this letter Marshall also advised the Secretary that the Judge Advocate General had no objections “to the foregoing procedure.”

Commandant of the 12th Naval District at San Francisco informed Kimmel that he had been directed to relate to him that Major General Short had submitted a request for retirement.¹⁶⁶ Kimmel took this as a suggestion that he submit a similar request, and he did so on January 26, 1942.¹⁶⁷

In a letter to Kimmel dated January 27, 1942, Admiral Stark informed him that he had shown the Secretary of the Navy and the President "your splendid letter stating that you were not to be considered and that only the country should be considered," assuring Kimmel that "we will try and solve the problem on the basis of your letter—'whatever is best for the country.'"¹⁶⁸ In his letter to Kimmel, Admiral Stark also stated that notification of General Short's request to retire was not intended to influence Kimmel "to follow suit."¹⁶⁹ In a letter to the Secretary of the Navy, dated January 28, 1942, Rear Admiral Kimmel acknowledged that he had been "informed today by the Navy Department that my notification of General Short's request was not intended to influence my decision to submit a similar request," but he reaffirmed his request to retire.¹⁷⁰

The President was informed immediately that both officers had submitted requests for retirement, and he proposed in a cabinet meeting that an announcement be made that acceptance of their requests for retirement would not bar subsequent courts-martial.¹⁷¹ With the concurrence of the President, Kimmel's retirement was formally accepted by letter of February 16, 1942,¹⁷² and Short's by letter of February 17, 1942.¹⁷³ Rear Admiral Kimmel's retirement was effected

¹⁶⁶PHA17, at 2727-28 ("Rear Admiral Randall Jacobs, U.S.N., Chief of the Bureau of Navigation, Navy Department, Washington, D.C., had telephoned an official message to be delivered to me which stated that Admiral Jacobs had been directed by the Acting Secretary of the Navy [later discovered to have been Secretary Knox, not the Acting Secretary] to inform me that General Short had submitted a request for retirement.").

¹⁶⁷PHA17, at 2728. The request for retirement is reproduced on page 2733 ("I hereby request that I be placed upon the retired list . . .").

¹⁶⁸PHA17, at 2732. Admiral Kimmel restated these sentiments in a letter to Admiral Stark on February 22, 1942: "I submitted this request [for retirement] to permit the department to take whatever action they deemed best for the interests of the country." PHA17, at 2729.

¹⁶⁹*Id.*

¹⁷⁰"I desire my request for retirement to stand, subject only to determination by the Department as to what course of action will best serve the interests of the country and the good of the service." PHA17, at 2732. *See also* PHA6, at 2561 (Rear Admiral Kimmel's testimony).

¹⁷¹PHA7, at 3140. *See* GORDON W. PRANGE, *AT DAWN WE SLEPT* 608 (1981)(quoting from Secretary Stimson's Diary). Secretary Stimson suggested to the President that non-condonation language be included in the official retirement letters ("In order that the acceptance of these requests for retirement may not be considered as a condonation of . . . offenses"). PHA7, at 3140.

¹⁷²PHA17, at 2731.

¹⁷³PHA7, at 3142; PHA19, at 3804.

under 34 U.S.C. § 381,¹⁷⁴ and Major General Short's retirement was effected under 10 U.S.C. § 943.¹⁷⁵ Both officers had submitted their applications for voluntary retirement in the face of advice that they were not required to do so, having specifically acknowledged that they were not required to do so.

Both of the letters approving the commanders' requests to retire contained the phrase "without condonation of any offense or prejudice to future disciplinary action."¹⁷⁶ The President himself had proposed similar language, and had indicated that an opinion on the exact language to be used should be obtained from the Attorney General of the United States.¹⁷⁷ The Attorney General, Francis Biddle, recommended against specific reference to courts-martial, to leave "the matter open for further action on the part of the government without stating that a particular course is planned or that any special interpretation has been placed upon the acts committed."¹⁷⁸ The Judge Advocate General of the War Department had also been consulted about the non-condonation language and he submitted detailed legal memoranda to the Chief of Staff of the Army and the Secretary of War, recounting the difficulties with immediate courts-martial,¹⁷⁹ assessing the possibility that acceptance of voluntary retirements could be construed as condonation, and analyzing the public relations aspects of various courses of action available to the government (i.e., which legally available courses of action might lead to public charges of whitewashing, and which legally available courses of action might lead to claims of persecution).¹⁸⁰ The final course of action chosen left the matter open for further consideration, provided notice to the affected officers that additional action might be taken, and informed the public that future action had not been ruled out in a matter in which the public had every right to

¹⁷⁴"When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application." See PHA17, at 2731.

¹⁷⁵This section provided for retirement of Army officers after 30 years of service, upon the officer's own application, in the discretion of the President. See PHA7, at 3142, 3146.

¹⁷⁶PHA17, at 2731; PHA7, at 3142.

¹⁷⁷PHA7, at 3140-41.

¹⁷⁸PHA7, at 3141-42. The Attorney General's advice to leave open the question of what specific action might be taken is exactly the kind of advice that any staff judge advocate might give his convening authority today, to ensure that the full range of discretionary options is left open until a considered decision can be made.

¹⁷⁹E.g., the publication of secret documents or testimony during the war, and the time and effort required of many senior officers to act as courts-martial members and witnesses, which would distract from prosecution of the war. PHA7, at 3145.

¹⁸⁰PHA7, at 3145-3147; PHA19, at 3809-3810. The Judge Advocate General also noted that the President had authority to summarily discharge Major General Short under Articles of War 118. See LEE S. TILLOTSON, *THE ARTICLES OF WAR ANNOTATED* 253-56 (1942)(discussing administrative discharges and dismissal). One would expect any staff judge advocate's personal advice to his commander/client in a highly visible case to include consideration of the possible external impacts of various courses of action available.

be intensely interested.¹⁸¹ Retired officers, as a matter of law, remain subject to recall to active duty for disciplinary action.¹⁸² There is no legal reason why the non-condonation language could not be included in the retirement letters.

Under the law as it then existed, Kimmel retired in his permanent grade, as a Rear Admiral,¹⁸³ and Short retired in his permanent grade, as a Major General.¹⁸⁴ The retirements of Kimmel and Short were clearly lawful, and the permanent grades in which they retired were those provided for by the law applicable to all officers of the Navy and Army who had previously held temporary appointments to higher ranks.¹⁸⁵ Whether the Secretaries of the Navy and War Departments, the Chief of Naval Operations and Chief of Staff of the Army, or the President himself desired or encouraged the retirement of Kimmel or Short has no bearing on the legitimacy of their retirements. The retirements were voluntarily requested and effected in accordance with law. As discussed below, the President could have fired them anyway.

Right to a Court-Martial

Advocates for Kimmel and Short have treated the fact that they were never court-martialled as a grievance.¹⁸⁶ No one has a right to a court-martial to "clear his name."¹⁸⁷ The decision to convene a court-martial or to refer particular charges to a court-martial is highly discretionary with individual military convening authorities. A "forced" court-martial would probably be defective jurisdictionally. There are, however, two situations in which a service

¹⁸¹The press releases are reproduced in PHA19, at 3811 (Short) and 3815 (Kimmel). Both releases quote the non-condonation clause and indicate that charges would not be tried until the "public interest and safety would permit."

¹⁸²See PHA7, at 3146 (advice of the Judge Advocate General, War Department, to Secretary of War, par. 2 (citing applicable laws)); 10 U.S.C.S. § 802(a)(4) (1997)(UCMJ art. 2(a)(4)); *United States v. Fletcher*, 148 U.S. 84 (1892)(officer court-martialled four years after retirement and dismissed from the service).

¹⁸³Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89.

¹⁸⁴Act of Aug. 5, 1939, ch. 454, 53 Stat. 1214, *as amended*, Act of July 31, 1940, ch. 647, 54 Stat. 781.

¹⁸⁵Officials have made this point previously. *See, e.g.*, SECNAV (Ball) memo of 7 Dec 88 (for SECDEF)(Subj: Request for Posthumous Promotion of Rear Admiral Husband E. Kimmel - Action Memorandum)("[N]either Rear Admiral Kimmel nor any other flag officer was statutorily eligible to retire as an Admiral at the time of his retirement. For that reason, it does not appear that retirement in his permanent grade was intended as punishment."); CNO (Trost) First Endorsement on DIRNAVHIST memo of 5 Jan 88, Ser 00/8U500015 of 19 Jan 88 (to SECNAV)("Rear Admiral Kimmel's retirement as a two star cannot be considered punitive since it was required by the law at that time.").

¹⁸⁶*E.g.*, the "Thirty-six Flag Officer Petition," 22 Oct 91 (to President Bush), at 1-2. Kimmel advocates are apparently unaware that Kimmel declined the offer of a court-martial. *Infra*, p. 72 n.356.

¹⁸⁷*Mullan v. United States*, 212 U.S. 516, 520 (1909)(holding specifically that the Secretary of the Navy is under no obligation to convene a court-martial "to clear the name of any officer").

member may *request* a court-martial: in response to an order of dismissal,¹⁸⁸ and in lieu of nonjudicial punishment. In neither situation, however, is there a right to *receive* a court-martial.

Dismissals and Courts-martial

A commissioned officer has no Constitutional right to remain in the service¹⁸⁹ and may be separated involuntarily in a number of different ways, including the stigmatic order of dismissal.¹⁹⁰ Dismissal of an officer from the service is a much more severe measure than subtle pressure to retire voluntarily. A formal dismissal would cause not only injury to reputation, but also deprivation of material benefits. Dismissal deprives an officer of his commission and all pay, benefits and entitlements, including retirement pay.¹⁹¹ The President's power to dismiss an officer from the service, once unlimited,¹⁹² is today, in *peace time*, limited by statute to dismissal

¹⁸⁸CHARLES A. SHANOR & TIMOTHY P. TERRELL, *MILITARY LAW IN A NUTSHELL* 249 (1980)(A commissioned officer dismissed by order of the President may request a court-martial, but "there is no right to such a trial.").

¹⁸⁹*Supra*, note 94.

¹⁹⁰10 U.S.C.S. § 1161(a)(3) (1997). On the Executive power of dismissal, see 4 Op. Att'y Gen. 603, 609-13 (1847); 8 Op. Att'y Gen. 223, 230-32 (1856); 17 Op. Att'y Gen. 13 (1881). Congress also has power to provide for the removal of officers. One of the great compromises made in the drafting of the Constitution was the decision to omit any clause prohibiting the existence of a standing army, allowing Congress, instead, sufficient power to "increase the Army, or reduce the Army, or abolish it altogether." *Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893), *aff'd* 165 U.S. 553 (1897). See THE FEDERALIST No. 24, at 153 (Hamilton)(Jacob E. Cooke ed., 1961); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 202-03 (1985). If Congress has power to disestablish the Army and Navy altogether, which is scarcely subject to doubt, it must have power to provide for the removal of one officer at a time.

¹⁹¹*See, e.g., United States v. Ballinger*, 13 C.M.R. 465 (A.B.R. 1953)(Dismissal is officer-equivalent of a dishonorable discharge and has equivalent effect on benefits and entitlements.); *Van Zante v. United States*, 62 F. Supp. 310 (Ct. Cl. 1945); JAGJ 1953/4541 of 25 May 53; LEE S. TILLOTSON, *THE ARTICLES OF WAR ANNOTATED* 255 (1942)("Summary dismissal by executive order is a separation from the service under other than honorable conditions."). See also 38 U.S.C.S. § 101(2) (1997)("Veteran" does not include one discharged under conditions other than honorable), and provisions throughout Title 38 U.S.C. that state the impact on various veteran's benefits of a discharge under conditions other than honorable.

¹⁹²*See, e.g., Wallace v. United States*, 257 U.S. 541, 544 (1922); *United States v. Corson*, 114 U.S. 619, 620-21 (1885); *Blake v. United States*, 103 U.S. 227, 231-33 (1881); 4 Op. Att'y Gen. 1 (1842)(Advising the Secretary of the Navy that the President, as Commander in Chief, has absolute power to dismiss an officer from the service without a court-martial, notwithstanding that the exercise of such power might subject "brave and honorable men" to "capricious despotism," "deprive them of their profession" and even "sully their good name.").

pursuant to the sentence of a general court-martial.¹⁹³ Congress has not attempted, however, to abrogate the power of the President to dismiss an officer *in time of war*.¹⁹⁴

Today, article 4 of the UCMJ provides some procedural safeguards for officers subject to Presidential dismissals in time of war, including that officers dismissed by order of the President may *request* a court-martial.¹⁹⁵ The right to request a court-martial in such cases, however, was not provided to officers of the Army until 1950 with the enactment of the first UCMJ,¹⁹⁶ although the right to request a court-martial pre-existed the UCMJ in the *Articles for the Government of the Navy*.¹⁹⁷ The current UCMJ standard, adopted from the *Articles for the Government of the Navy*, does not provide a *right* to a court-martial even after the President has ordered such a harsh sanction as dismissal. "If the President fails to convene a general court-martial within six months . . . the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue,"¹⁹⁸ and "[i]f an officer is discharged from any armed force by administrative action . . . he has no right to trial under this article."¹⁹⁹ Accordingly, the President may order a dismissal, ignore a demand for court-martial, and the officer will be

¹⁹³ 10 U.S.C.S. § 1161(a)(1) (1997). A convening authority may also commute a court-martial sentence to dismissal. 10 U.S.C.S. § 1161(a)(2) (1997). But for the statutory limitation imposed by the 1866 predecessor to 10 U.S.C.S. § 1161 (1997) (founded upon Congress's Constitutional power to "make Rules for the Government and Regulation of the land and naval Forces"), the President could summarily dismiss an officer from the service at *any* time, peace or war, revoking his commission and cutting off all pay and benefits. Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92. See *Fletcher v. United States*, 26 Ct. Cl. 541, *rev'd on other grounds*, 148 U.S. 84 (1891).

¹⁹⁴ 10 U.S.C.S. § 1161(a)(3) (1997) specifically recognizes the President's authority to order the dismissal of an officer in time of war. See *McElrath v. United States*, 102 U.S. 426 (1880) (In time of war neither sentence of court-martial, nor any commutation thereof, is required as "condition precedent" to the President's exercise of the power of dismissal). See also EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984* 187 (Randall W. Bland et al, eds., 5th ed. 1984) (Congress has never attempted to limit the President's power of dismissal in time of war; that power remains absolute.); CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 128-29 (1921) (short legal history of President's power to dismiss officers—the power is unimpaired in time of war).

¹⁹⁵ 10 U.S.C.S. § 804 (1997) (UCMJ art. 4) ("If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations . . .").

¹⁹⁶ See LEE S. TILLOTSON, *THE ARTICLES OF WAR ANNOTATED* 255 (1942) ("An officer summarily dismissed by order of the President in time of war is not entitled to trial by court-martial."). The first *Uniform Code of Military Justice* added the right to demand a court-martial in 1950. Act of May 5, 1950, ch. 169, § 1 (UCMJ art. 4), 64 Stat. 110.

¹⁹⁷ ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 37, *reprinted in* NAVAL COURTS AND BOARDS 465, §B-39 (1937).

¹⁹⁸ 10 U.S.C.S. § 804(b) (1997).

¹⁹⁹ 10 U.S.C.S. § 804(d) (1997). See ARTICLES FOR THE GOVERNMENT OF THE NAVY 36, 37 (1930) (same as the UCMJ).

administratively separated from the Service without a hearing after six months. Moreover, according to the law, if the President does convene a court-martial, and it *acquits* the officer or fails to order dismissal or death, "the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue."²⁰⁰ An officer would under no circumstances be entitled by a court-martial acquittal to restoration to his previous military position, or to any particular position in the armed forces, because the President has the sole power to appoint officers of the Armed Forces.²⁰¹ The limited victory achieved at a court-martial today, if one were convened, would mean only that the dismissed officer would be separated under Service regulations.²⁰²

After the United States had declared war, President Roosevelt had at his disposal the severe power of executive dismissal in time of war, and it is clear under then-existing law that Rear Admiral Kimmel and Major General Short had no *right* to courts-martial even to air dismissals.²⁰³ Speaking of himself and Kimmel, Major General Short testified before the JCC that "both Departments had the legal right to refuse us a courts-martial, if they saw fit to do so."²⁰⁴

There is one other circumstance in which the law provides that service members may request a court-martial: all officers and enlisted members who are not attached to or embarked in a vessel may refuse non-judicial punishment under article 15 of the UCMJ, and request a court-martial in lieu of such proceedings.²⁰⁵ In the face of such a request, however, the convening authority may decline to pursue charges in *any* forum, choosing to resolve issues administratively. Article 15 does not provide a *right* to a court-martial.

Service members never have a *right* to a court-martial, only a right to request one under limited circumstances. Actions or statements that impugn the judgment or professional performance of an officer in a particular situation need not be authorized by the verdict of a court-martial or other "due process" hearing beforehand, nor do such actions or statements afterwards give rise to a right to a court-martial or other hearing to challenge or rebut them. No one in the military has or has ever had the right to demand a court-martial in lieu of an administrative investigation, to correct perceived errors in an administrative investigation, to challenge a relief

²⁰⁰10 U.S.C.S. § 804(a) (1997).

²⁰¹10 U.S.C.S. § 804(c) (1997)("If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed.").

²⁰²See CHARLES A. SHANOR AND TIMOTHY P. TERRELL, *MILITARY LAW IN A NUTSHELL* 249-50 (1980).

²⁰³*Supra*, p. 44 n.194. The current statutory scheme applicable to dismissal in time of war (10 U.S.C.S. § 804 (1997)) still affirms the extensive discretionary powers of the President over the appointment, removal and service, generally, of officers.

²⁰⁴PHA7, at 3149.

²⁰⁵10 U.S.C.S. § 815(a) (1997)(UCMJ, art. 15(a)). See MCM (1995), Part V, par. 4.

from command, to ensure that the fault of others is publicly revealed,²⁰⁶ or to counteract bad publicity. If an appropriate convening authority were inclined to refer charges to a court-martial as a "courtesy," and the jurisdictional prerequisites for a court-martial were met, he could do so, but no officer, including Kimmel and Short, has a right to compel his own court-martial.²⁰⁷

Effect of Acquittal

A judgment of acquittal at a court-martial merely reflects the opinion of two-thirds of the members of the court-martial that the government did not prove beyond a reasonable doubt that the accused committed a *criminal offense*. Charges tried before a court-martial may not be referred to another court-martial after an acquittal.²⁰⁸ A court-martial acquittal, however, does not mean that the accused committed *no* misconduct, or that an acquitted officer was free from errors of judgment unacceptable for one in his position of responsibility, or that he is or was properly qualified for any particular position of responsibility. As stated in *Fletcher v. United States*, the military "holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code."²⁰⁹ Acquittal at a court-martial does not entitle an officer to restoration of privileges previously enjoyed through the President's discretion.²¹⁰ A verdict that absolves one of criminal responsibility does not also deprive the Commander in Chief of the power to command.

The standard of proof at a court-martial, as in any criminal trial, is "beyond a reasonable doubt." This high evidentiary standard might produce an acquittal for want of evidence in a court-martial case where more than sufficient evidence exists to support *administrative* decisions

²⁰⁶*Infra*, pp. 100 n.471, 102 n.478. Under the rules of evidence, the collateral misconduct of others would be inadmissible as irrelevant. A court-martial for dereliction of duty would not try the alleged derelictions or omissions of others. See Military Rule of Evidence (MRE) 402, MCM (1995). The Military Rules of Evidence are based on the Federal Rules of Evidence. The rule of relevance has ancient common law roots.

²⁰⁷See *Mullan v. United States*, 42 Ct. Cl. 157, 172 (1907), *aff'd*, 212 U.S. 516 (1909)(In a case noteworthy for the personal participation of President William McKinley, the Court of Claims held that a naval officer had no right to demand that charges against him be investigated by a court of inquiry or a court-martial. The Secretary of the Navy was empowered to convene a court of inquiry or a court-martial at the request of an officer, but he also had discretion as to whether any such tribunal would be convened.).

²⁰⁸10 U.S.C.S. § 844 (1997)(UCMJ art. 44).

²⁰⁹26 Ct. Cl. 541, 562-63 (1891), *rev'd on other grounds*, *United States v. Fletcher*, 148 U.S. 84 (1893); *Swaim v. United States*, 28 Ct. Cl. 173, 227 (1893)(quoting *Fletcher*). Certainly the same standard, that mere freedom from crime is not sufficient, applies to the most senior officers of the Navy.

²¹⁰As Admiral Carlisle Trost stated, "[I]n terms of accountability, there is a vast difference between a degree of fault which does not warrant punitive action and a level of performance which would warrant bestowal of a privilege." CNO (Trost) memo Ser 00/8U500015 of 19 Jan 88 (First End. on DIRNAVHIST memo of 5 Jan 88)(on the failure of previous administrations to nominate Rear Admiral Kimmel for advancement on the retired list).

not subject to any form of adjudication.²¹¹ The administrative actions taken by the government with respect to Kimmel and Short could have been taken *notwithstanding the existence of hypothetical courts-martial acquittals of "dereliction of duty."*²¹² Finally, any court-martial of Kimmel or Short that had followed the applicable rules of evidence would have found inadmissible evidence of the collateral fault of others in the Pearl Harbor disaster. Courts-martial, like all criminal trials, do not try whole incidents and everyone involved in them; they try specific charges against specific individuals only. The collateral fault of others is not a defense; and Kimmel and Short could not have used courts-martial as soapboxes to demand the indictment of others.²¹³

Courts and Boards of Inquiry and Supplemental Investigation

Advocates of Rear Admiral Kimmel treat the favorable findings of the Navy Court of Inquiry as tantamount to a judicial acquittal.²¹⁴ A court of inquiry is not a criminal court; such bodies may not try, acquit, or convict anyone of a criminal offense,²¹⁵ nor do they make

²¹¹Related to this reasoning is the traditional rule that acquittal of a criminal charge does not bar subsequent civil actions for damages based on the same conduct. The same evidence that might not meet the higher standard of proof applicable in a criminal context ("beyond a reasonable doubt") might satisfy the standard of proof for liability in a civil context ("a preponderance of evidence"). In *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972), the Supreme Court held that a prior criminal acquittal on the underlying offense did not bar a civil forfeiture action because "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel." Likewise, in *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938), the Court observed that "the difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*."

²¹²In fact, even more severe administrative action could have been taken notwithstanding courts-martial acquittals. *E.g.*, 12 Op. Att'y Gen. 421, 424-26 (1868)(President had authority to disapprove findings of court-martial and dismiss officer from service notwithstanding his acquittal on charges of neglect of duty. The discretionary power of the President to dismiss is separate from the power of a court-martial to sentence an officer to dismissal.). *See also*, *McElrath v. United States*, 102 U.S. 426, 437-39 (1880)(Presidential dismissal is valid even if based upon an erroneous understanding of predicate facts).

²¹³*See infra*, pp. 76-77 n.374, 100 n.471, 102 n.478. The *McVay* case raises this issue more directly; hence, Part III of this paper develops the issue more thoroughly.

²¹⁴*E.g.*, the "Thirty-six Flag Officer Petition," 22 Oct 91 (to President Bush), at 2 ("The Court of Inquiry cleared Admiral Kimmel of any improper performance with regard to his duties . . ."); Thomas K. Kimmel ltr of 11 May 88 (to SECNAV William Ball)(The court of inquiry "completely exonerated him."); Edward B. Hanify (Ropes & Gray) memo for DIRNAVHIST (OP-09BH), of 23 Dec 87 (thirteen pages of argument on the findings of the court of inquiry, without citation to a single legal authority).

²¹⁵NAVAL COURTS AND BOARDS 347, ¶ 720 (1937)("The proceedings of these bodies [courts of inquiry] are in no sense a trial of an issue or of an accused person; they perform no real judicial function . . ."); EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 212 (3d ed. 1910), ¶ 459 ("The court of inquiry is not a judicial tribunal.").

professional personnel decisions.²¹⁶ Courts of inquiry are investigative tools²¹⁷ to assist decision making by the authorities that convened them.²¹⁸ The principal purpose of a court of inquiry is to gather and organize information. Such a "court" may express opinions and recommendations only when specifically authorized to do so.²¹⁹ A convening authority is not required to accept the findings, opinions or recommendations of a court of inquiry. Such findings, opinions and recommendations are advisory only.²²⁰ If dissatisfied with the results of a court of inquiry, the

²¹⁶*Rogers v. United States*, 270 U.S. 154 (1926)(Findings of military courts of inquiry merely adduce evidence and are not binding on subsequent personnel decisions—officer's discharge upheld notwithstanding favorable finding of court of inquiry.).

²¹⁷MILTON C. JACOBS, *OUTLINE OF MILITARY LAW: UNITED STATES SUPREME COURT DECISIONS* 59 (1948)(Courts of inquiry "are convened to investigate a matter."); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 517 (2d ed. 1920)(A court of inquiry is not a court; not a trial; its opinions, when given, are not judgments; it does not administer justice; its role is to "examine and inquire."). See 10 U.S.C.S. § 935(a) (1997)(UCMJ, art. 135(a)).

²¹⁸NAVAL COURTS AND BOARDS 347, ¶ 720 (1937)(Courts of inquiry "are convened solely for the purpose of informing the convening authority in a preliminary way as to the facts involved in the inquiry . . ."); 8 Op. Att'y Gen. 335, 347, 349 (1857)(In a case involving the use of courts of inquiry to investigate the general fitness of officers of the Navy, of all grades, the Attorney General specifically rejected the notion that "the sole object of a court of inquiry is the exculpation of some officer, the individual subject of the inquiry" and clarified that "[t]he object of a court of inquiry is the ascertainment of facts for the information of superior authority." The Attorney General noted that members of the military community often mistook the "real nature" of such courts, and "their true legal relation to the Executive.")

²¹⁹NAVAL COURTS AND BOARDS 347, ¶ 720 (1937)(Courts of inquiry are fact-finding bodies and will not express opinions or make recommendations unless directed to do so in the convening authority's precept.); 8 Op. Att'y Gen. 335, 339, 342 (1857)(Courts of inquiry merely state facts and do not offer opinions unless specifically required to do so by the convening authority); EDWARD M. BYRNE, *MILITARY LAW: A HANDBOOK FOR THE NAVY AND MARINE CORPS* 258 (1970)(Opinions and recommendations are expressed in the report of an investigation only when directed by the convening authority). The same rule applies today. 10 U.S.C.S. § 935(g) (1997)(UCMJ, art. 135(g)).

²²⁰NAVAL COURTS AND BOARDS 347, ¶ 720 (1937)(Conclusions of courts of inquiry "are merely advisory."); *Beard v. Stahr*, 370 U.S. 41 (1962)(Plaintiff's due process claim against board of inquiry and board of review dismissed as premature because the secretary had not yet exercised his discretion to approve or disapprove recommendations of the boards—such boards are merely advisory to the convening authority); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 531 (2d ed. 1920)(The convening authority may take action on a court of inquiry "at his discretion." "If an opinion be given, it is in no respect binding upon him, being in law merely a recommendation to be approved or not as he may determine."); EDGAR S. DUDLEY, *MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL* 218 (3d ed. 1910), ¶ 476 ("The record of the court [of inquiry] when received by the convening officer may be acted upon, in his discretion, by approval or disapproval."); 4 Op. Att'y Gen. 1 (1842)(Power of the President to Dismiss from Service)(advising the Secretary of the Navy that the President has absolute, constitutional power to dismiss an officer from the service without a court-martial, notwithstanding the favorable findings of a court of inquiry). That courts of inquiry are advisory only has been the tradition from time immemorial, and it is still taught in the Navy today. E.g., NAVAL JUSTICE SCHOOL, *ADMINISTRATIVE LAW STUDY GUIDE*, Ch. 1 (Administrative Investigations), Aug., 1996, par. 0101, 0103, at 1-1 (Administrative investigations, including courts of inquiry, "are purely administrative in nature—not judicial." Such investigations are "advisory only; the opinions are not final determinations or legal judgments." Recommendations made in the report of an investigation are not binding upon convening or reviewing authorities. "Originally adopted by the British Army," the court of inquiry "has remained in its present form with only slight modifications since the adoption of the

convening authority may order additional investigation by the court,²²¹ or conduct additional investigation by other means, including single-officer investigations.²²² The findings of a court of inquiry, being in no way a legal judgment, they are not entitled to finality nor do they create some form of estoppel of the secretary's or the president's inherent investigative powers. No one has a right to a court of inquiry,²²³ to enforcement of its findings, or to correction of its errors. Courts of inquiry are tools for those empowered to convene them. They do not create personal rights.

A proper convening authority may appoint a court of inquiry to investigate and advise on any matter within the convening authority's responsibility. Convening authorities frequently seek from courts of inquiry recommendations with respect to personal responsibility and whether evidence would support courts-martial. A convening authority may proceed, however, to a general court-martial, or decide not to proceed to a general court-martial, notwithstanding a contrary recommendation by a court of inquiry. Before 1950 a convening authority could proceed directly to a general court-martial without conducting a court of inquiry or other formal investigation.²²⁴ Under the current military justice system, a hearing that accords due process rights to an individual accused of an offense must be conducted, unless waived by the accused, before a convening authority may refer charges to a general court-martial.²²⁵ The requirement for

Articles of War of 1786."). *But see*, Ned Beach, *Comment*, "Reopen the Kimmel Case," NAVAL INST. PROCEEDINGS, Apr. 1995, at 27 (mistaking the 1944 court of inquiry for "a legal judgment of fault").

²²¹*E.g.*, EDGAR S. DUDLEY, *MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL* 219 (3d ed. 1910), ¶ 476 ("If the proceedings [of a court of inquiry] are not satisfactory to him [the convening authority], he may return them for revision or further investigation . . .").

²²²NAVAL COURTS AND BOARDS 347, ¶ 720 (1937)(Convening authority has discretion to decide whether to use a court of inquiry, a single-officer investigation, or a board of investigation.). Forrestal's decision to order single-officer investigations by Admiral Hart and Admiral Hewitt was clearly within his lawful powers. Admiral Thomas Hart conducted his investigation pursuant to a precept of the Secretary of the Navy, dated 12 February 1944. PHA 16, at 2265. Admiral H. Kent Hewitt conducted his investigation pursuant to Forrestal's precept of May 2, 1945. PHA 16, at 2262. Kimmel advocates refer to these additional investigations as "ex parte inquiries," as if Kimmel had some right to stand between the Secretary of the Navy and any quest for information concerning him. *See*, *e.g.*, Edward B. Hanify (Ropes & Gray) memo for DIRNAVHIST (OP-09BH) of 23 Dec 87, at 10 (without citation to a single legal authority).

²²³*Mullan v. United States*, 42 Ct. Cl. 157, 172 (1907), *aff'd*, 212 U.S. 516 (1909)(Naval officer had no right to demand that charges against him be investigated by a court of inquiry or a court-martial. The Secretary of the Navy had unreviewable discretion as to whether any such tribunal would be convened.); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 521 (2d ed. 1920)(Exercise of the authority to order a court of inquiry is discretionary—"Neither the President nor a commanding officer is obliged to order a court under *any* circumstances." (emphasis in original)). The courts will not order that a court of inquiry or other formal investigation be conducted. *E.g.*, *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970), *aff'g* *Arnheiter v. Ignatius*, 292 F. Supp. 911, 926 (N.D. Ca. 1968)(civil court had no jurisdiction to issue mandamus to Secretary of the Navy to conduct a court of inquiry or other formal hearing into plaintiff's relief from command).

²²⁴*E.g.*, *Humphrey v. Smith*, 336 U.S. 695, 698 (1949)(*Articles for the Government of the Navy* do not require that formal investigations be conducted before courts-martial). *Cf.* The Fifth Amendment specifically excludes courts-martial from the pretrial requirements of the Grand Jury Clause. U.S. Const. amend. 5.

²²⁵10 U.S.C.S. § 832 (1997)(UCMJ art. 32); RCM 405, MCM (1995).

such a hearing may be satisfied by a properly conducted court of inquiry, by an investigation conducted pursuant to article 32 of the UCMJ, or by similarly "formal" proceedings.²²⁶ The findings and recommendations of a court of inquiry or article 32 investigating officer still have no legal finality or effect of *res judicata*.²²⁷ If a convening authority is satisfied with the sufficiency of evidence, he may refer charges directly to a general court-martial *contrary to the recommendations in an investigative report*.²²⁸ This type of discretion afforded convening authorities in the military is inherent throughout the structure of the *Uniform Code of Military Justice*, and the courts have upheld it repeatedly.²²⁹

To say that the Court of Inquiry or Army Pearl Harbor Board vindicated or exonerated either Kimmel or Short and therefore entitled them to restoration of rank misstates the purpose and effect of such investigative bodies within the military.²³⁰ The *complete* proceedings in both the Kimmel and Short cases included the endorsements of senior military and civilian officials, based on additional investigation and deliberation. The *juridical* significance of the Navy Court of Inquiry and the Army Pearl Harbor Board resides solely in the final reports of the Secretaries who convened them. The endorsements and final reports continued to find significant fault with both Rear Admiral Kimmel and Major General Short.²³¹

²²⁶RCM 405(b), MCM (1995).

²²⁷I.e., "the matter has already been decided," precluding inconsistent subsequent action.

²²⁸E.g., *United States v. Schaffer*, 12 M.J. 429 (CMA 1982)(Unlike a grand jury's refusal to indict—a recommendation against prosecution in a pretrial investigation will not preclude trial by court-martial.).

²²⁹Courts-martial convening authorities play a decisive role throughout the military justice process, including decision-making under the following rules: RCM 303 (preliminary inquiry); RCMs 304(b), 305 (pretrial restraint and confinement); RCM 306 (initial disposition of offenses); RCM 401 (disposition of charges); RCM 404 (actions available to special court-martial convening authority); RCM 407 (actions available to general court-martial convening authority); RCMs 502, 503 (selection and detailing of members of courts-martial); RCM 601 (referral of charges); RCM 702(b) (ordering depositions); RCM 704 (grants of immunity); RCM 705 (negotiating and entering pretrial agreements on behalf of the government); RCM 1101 (temporary deferment of sentence to confinement); RCM 1107 (action on findings and sentence); MCM (1995). See *Parker v. Levy*, 417 U.S. 733 (1974); *United States v. Solorio*, 483 U.S. 435 (1987)("universal" courts-martial jurisdiction over military personnel).

²³⁰As a factual matter, the Army Pearl Harbor Board did not exonerate Major General Short. The Board did, however, spread blame to General Marshall, Secretary of State Cordell Hull, and others. PHA 3, at 1450-51.

²³¹After considering the findings of the Army Pearl Harbor Board, in his official report Secretary of War Stimson reached conclusions regarding the responsibility of Major General Short that were, as he stated, "in general accord" with the findings of the Roberts Commission and the Army Pearl Harbor Board. *Official Report of the Secretary of War Regarding the Pearl Harbor Disaster*, Dec. 1, 1944, PHA 35, at 19. Secretary Forrestal's lengthy final report analyzed the findings of the court and the intermediate endorsements, concluding that Kimmel had not been guilty of dereliction of duty, but that Kimmel and Stark had "failed to demonstrate the superior judgment necessary for exercising command commensurate with their rank and their assigned responsibilities." *The Findings, Conclusions and Action by the Secretary of the Navy*, PHA 16, at 2429.

Challenges of the legitimacy of supplemental investigation conducted by Hewitt and Clausen, at the direction of the Secretary of the Navy and the Secretary of War, have overlooked not only the standing law on investigations, but also the specific statutory charge that precipitated the Court of Inquiry and the Army Board. Both investigations were conducted pursuant to the following Congressional resolution: "*The Secretary of War and the Secretary of the Navy* are severally directed to proceed forthwith with an investigation into the facts surrounding the catastrophe."²³² As clarified by Congressman Murphy at the Joint Congressional Committee hearings, Congress charged the secretaries to investigate, without prescribing the particular form of investigation. The secretaries chose the court of inquiry or board format, in their discretion, "as a medium for obtaining information."²³³ That the secretaries conducted *additional* investigation merely reflects their dissatisfaction with the non-binding advice they received from the Court and the Board, again, a matter entirely within their discretion.²³⁴ The Secretaries could have fulfilled the purpose of the legislation by appointing investigative committees without according "party" rights to Kimmel or Short.²³⁵ Additional informal investigation conducted in both cases did not violate any due process rights because neither Kimmel nor Short had any right to a particular form of investigation, nor were the investigations used as the basis for denying any interest protected by the Due Process Clause.

The Court and the Board, after much dispute in Congress and in the public over extending the statute of limitations, and over whether courts-martial would ever be conducted, were appropriate fora to provide advice to the Secretaries on the sustainability of courts-martial charges. The real impact of the Court and Board, understood in the proper military context, was that the Secretaries concurred in advisory recommendations against the referral of courts-martial charges. As explained above, the Secretaries could have referred charges notwithstanding such recommendations.

The core function of any administrative investigation, including courts of inquiry, is to accumulate evidence for use by a convening authority.²³⁶ The recommendations of a court of inquiry are just that--recommendations. The convening authority may give the final recommendations of a court of inquiry whatever weight he thinks they deserve, and that may be no weight at all. Advocates for Kimmel and Short have misrepresented the roles of the Navy Court of Inquiry and the Army Pearl Harbor Board.²³⁷ Such proceedings are not trials by one's

²³²PHA3, at 1358-59 (emphasis added).

²³³PHA3, at 1359.

²³⁴Secretary Stimson took the additional step of consulting the Judge Advocate General of the Army and obtaining his confirming advice before ordering supplemental investigation. *Official Report of the Secretary of War Regarding the Pearl Harbor Disaster*, Dec. 1, 1944, PHA 35, at 12-13.

²³⁵Indeed, the Army Board was not a full "due process" hearing on the model of a court of inquiry.

²³⁶Other service regulations are consistent with the Navy's on this point. See, e.g., AR 15-6 (11 May 88), par. 1-5: "The primary function of any investigation or board of officers is to ascertain facts and to report them to the appointing authority."

²³⁷*Supra*, p. 47 n.214.

peers; they are a form of investigation conducted for a convening authority, in these cases the service secretaries.

All of the actions taken by the government with respect to the Navy and Army hearings were proper and lawful. The Court and the Board recommended against courts-martial, and no courts-martial were convened, reflecting the concurrence of the Secretary of the Navy and the Secretary of War that evidence of *criminal* misconduct by Kimmel or Short was inadequate to support courts-martial. The principal findings of the Court and Board, and the decisions of the Secretaries not to bring courts-martial charges, were released to the public,²³⁸ and detailed information of an exculpatory nature appeared in the press.²³⁹

Failure to Recommend Advancement

Rear Admiral Kimmel

In June 1942, Congress enacted a law "to provide for the retirement, with advanced rank, of certain officers of the Navy."²⁴⁰ Specifically, the law provided that

[A]ny officer of the Navy who may be retired while serving as the commander of a fleet or subdivision thereof in the rank of admiral or vice admiral, or who has served or shall have served *one year or more* as such commander, may . . . , *in the discretion of the President*, by and with the advice and consent of the Senate, when retired, be placed on the retired list with the highest grade or rank held by him while on the active list [T]he President, by and with the advice and consent of the Senate, may in his discretion extend the *privilege* herein granted to such officers as have heretofore been retired and who satisfy the foregoing conditions.²⁴¹

²³⁸ Advocates for Kimmel and Short have complained that the entire records of the proceedings of the Court of Inquiry and Army Board were not released immediately (for security reasons). Again, this reflects lack of understanding of applicable law. The decision to publish investigative findings lies with the convening authority. EDGAR S. DUDLEY, *MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL* 219 (3d ed. 1910), ¶ 477 (The convening authority may publish, in whole or in part, or not at all, the report and proceedings of a court of inquiry.); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 531-2 (2d ed. 1920) (Convening authority may publish all, part, or none of a court of inquiry, as he sees fit.). Cf. 8 Op. Att'y Gen. 335, 346 (1857) ("[T]he legal authorities are unanimous that a court of inquiry may be open or close, according as the authority ordering it shall prescribe," and such courts are presumed to be closed unless an exception is specified). *But see*, Ned Beach, *Comment, "Reopen the Kimmel Case,"* NAVAL INST. PROCEEDINGS, Apr. 1995, at 27 (Secretary Forrestal "impounded the court's proceedings"—insinuating that he had acted *ultra vires*).

²³⁹ E.g., Lewis Wood, *Kimmel and Short Will Not be Tried*, N.Y. TIMES, Dec. 2, 1944, at 1, col. 7; Felix Belair, Jr., *Army, Navy Report on Pearl Harbor*, N.Y. TIMES, Aug. 30, 1945, at 1, col. 1; *Pearl Harbor Summary*, N.Y. TIMES, Aug. 30, 1945, at 1, col. 2.

²⁴⁰ Act of June 16, 1942, ch. 414, 56 Stat. 370.

Rear Admiral Kimmel had served in a *position* that met the conditions of the law, but not for a full year (from February 1, 1941 through December 17, 1941).²⁴² The legislative history associated with this 1942 enactment does not mention Rear Admiral Kimmel, nor is there evidence of any particular purpose in the one year requirement.²⁴³ There is no evidence that Congress designed the law to exclude Rear Admiral Kimmel. If Kimmel had served as CominCh or CinCPac for more than one year, or if the law had provided for a shorter period of service, Kimmel would still have had no *claim* to advancement. He would merely have been *eligible* for such advancement. The law still recognized the constitutional discretion of the President to make appointments,²⁴⁴ referring to the authority provided by the law as “a privilege.” No claim of right or entitlement can exist in an honorary privilege²⁴⁵ that is wholly within the President’s discretion to recommend for advice and consent of the Senate.

In August 1947, Congress removed the one-year requirement in the Act of June 1942, as follows:

Any officer of the Navy who may be retired while serving in accordance with the provisions of section 413 of this Act,²⁴⁶ or subsequent to such service, may, in the discretion of the President, by and with the advice and consent of the Senate, when retired, be placed on the retired list with the highest grade or rank held by him while on the active list [T]he President, by and with the advice and consent of the Senate, may *in his discretion* extend the *privilege* herein granted to such officers heretofore or hereafter retired, who served in the rank of admiral or vice admiral pursuant to the authority of section 18 of the Act of May 22, 1917²⁴⁷

²⁴¹*Id.* (emphasis added). A final section of the law allowed the President to place CINC Asiatic Fleet, Admiral Hart, on the retired list as an Admiral without the advice and consent of the Senate.

²⁴²CHNAVPERs ltr Pers-E24-BS:lja 5015 of 3 Jun 58 (to Commanding Officer, Navy Finance Center)(RADM Husband E. Kimmel, USN-Ret, served on active duty as Admiral from February 1, 1941 through December 17, 1941).

²⁴³88 CONG. REC. 3177, 4016-17, 5009 (1942); S. REP. NO. 1277, 77th Cong., 2d Sess. 47 (1942); H.R. REP. NO. 2184, 77th Cong., 2d Sess. 77 (1942).

²⁴⁴U.S. Const. art. 2, § 2 (the “Appointment Power”).

²⁴⁵According to Senator Vinson, “This is an honor given them in recognition of their distinguished service, that is all.” 88 CONG. REC. 5009 (1942).

²⁴⁶*I.e.*, officers designated by the President for particular positions of importance who were also designated, and confirmed by the Senate, for service in the grades of admiral or vice admiral. Officer Personnel Act of 1947 (Aug. 7, 1947), ch. 512, §414, 61 Stat. 795, 876. “It was required that all three- and four-star officers be confirmed by the Senate—a definite departure from previous law [*i.e.*, the 1917 Act under which Kimmel had been appointed, and the 1939/1940 Acts under which Short had been appointed]. . . . [T]he appointment of the top-most military and naval officers in the Nation should be subject to Senate approval.” H.R. REP. NO. 640, 80th Cong., 1st Sess. (1947), *reprinted in* 1947 U.S. Code Cong. Serv. 1644, 1657-58.

²⁴⁷Officer Personnel Act of 1947 (Aug. 7, 1947), ch. 512, §414, 61 Stat. 795, 876 (emphasis added).

Under this Act, Rear Admiral Kimmel was eligible for consideration for advancement on the retired list to four-star rank, as an honorary *privilege*.²⁴⁸ In May 1948, the Department of the Navy initiated action to advance those retired officers who were eligible under the 1947 Act, but the Navy did not submit the name of Rear Admiral Kimmel.²⁴⁹ Records of the Bureau of Naval Personnel reflect that Kimmel was the only officer eligible for advancement under the 1947 Act who was not so advanced.²⁵⁰ Notwithstanding the favorable recommendations of the Chief of Naval Personnel (Admiral Holloway) in 1954 and 1957 when the subject of Kimmel's advancement was raised again, Secretary of the Navy Gates did not recommend the advancement of Rear Admiral Kimmel.²⁵¹ Rear Admiral Kimmel passed away on May 14, 1968.

Edward R. and Thomas K. Kimmel submitted an application to the Board for Correction of Naval Records (BCNR) on April 7, 1987, requesting "the Department of the Navy posthumously to take appropriate action pursuant to Title 10, U.S.C. § 1370(c)²⁵² to place Rear Admiral Husband E. Kimmel on the retired list with the rank of Full Admiral (Four Stars), the

²⁴⁸He had attained the rank of Admiral pursuant to an appointment under the 1917 Act, and he had "heretofore . . . retired." Notice that the 1947 Act does not provide for "restoration" of the highest grade or rank held, a term used by the Kimmel family. "Restoration" implies the resumption of a right or entitlement, an individualized "property" interest in a rank or grade that has been deprived. Service in three- or four-star grade had always been a temporary privilege. The 1947 law provided for the discretionary grant of that privileged status *de novo* to members of that class of officers who had enjoyed it previously, should the President and the Senate so choose. The honorary nature of the post-retirement promotions authorized under the 1942 and 1947 Acts is reflected in the fact that both acts specifically stated that no entitlement to increased retired pay would result from such promotions. Act of June 16, 1942, ch. 414, 56 Stat. 370 ("[N]o increase in retired pay shall accrue as the result of such advanced rank on the retired list"); Officer Personnel Act of 1947 (Aug. 7, 1947), ch. 512, § 414, 61 Stat. 795, 876 (same).

²⁴⁹BUPERS memo Pers-B13-leh of 22 Apr 54; CHNAVPERS (Holloway) memo Pers-B13-leh of 27 Apr 54 (to SECNAV).

²⁵⁰CHNAVPERS (Holloway) memo Pers-B13-leh of 27 Apr 54 (to SECNAV); CHNAVPERS (Holloway) ltr Pers-ig of 30 Jul 57 (to SECNAV via CNO); Pers-B8b-j1 memo of 24 Jan 67 for CHNAVPERS ("The names of all eligible officers except Admiral Kimmel were submitted to the President for nomination to the Senate for . . . advancements in early 1948.").

²⁵¹*Id.* The CNO's endorsement on Admiral Holloway's letter of July 30, 1957 (CNO ltr Op-212/ras, Ser 4667P21 of 9 Aug 57) recommended against advancement of Rear Admiral Kimmel ("[T]he question of responsibility has never been removed from controversy."). Secretary Gates wrote to Senator John Cooper on August 27, 57: "I have given the matter the most careful and sympathetic consideration, and I do not believe that it would be in the best interest of the Nation, nor in the ultimate interest of Rear Admiral Kimmel, for the Navy to recommend his advancement on the retired list. I, therefore, intend to initiate no action in this regard in behalf of the Department of the Navy."

²⁵²This provision applies only to *current* retirements of officers who have served in three- and four-star positions by appointment under 10 U.S.C.S. § 601 (1997), a provision enacted in 1980. 10 U.S.C.S. § 1370(c) (1997) by its own terms, therefore, could not have applied to Rear Admiral Kimmel.

highest grade in which he served when on active duty.”²⁵³ BCNR, which acts in an advisory capacity for the Secretary,²⁵⁴ recommended administrative closure of the case on June 9, 1987, on the grounds that the relief requested was not within BCNR’s or the Secretary’s jurisdiction.²⁵⁵ Essentially, the position taken by the Navy has been that exercise of the President’s constitutionally-based discretion to make (or decline to make) appointments is not subject to compulsion as a “correction” for error or injustice.²⁵⁶ In January 1989 the Deputy Secretary of Defense rejected an appeal to forward the Kimmel BCNR matter to the President for his consideration,²⁵⁷ affirmed by Secretary Cheney in June 1990.²⁵⁸

Currently, there is no statute under which Rear Admiral Kimmel may be posthumously advanced.²⁵⁹ Among current laws, 10 U.S.C. § 601(a) applies to the appointment of officers *on active duty* to current military positions of command designated to carry the grade of general or admiral, and 10 U.S.C. § 1521 applies only to posthumous commissions *which would have*

²⁵³DD Form 149 Application for Correction of Military Record in the case of Rear Admiral Husband E. Kimmel (BCNR file 05382-87), April 7, 1987.

²⁵⁴In accordance with 10 U.S.C.S. § 1552 (1997), it is the Secretary of the Navy who “may correct any military record” of the Navy when he “considers it necessary to correct an error or remove an injustice.” Except under limited circumstances that do not apply to the Kimmel case, records must be corrected, if at all, with the approval of the Secretary, acting on advice from the Board. The Board does not have authority to compel the correction of records over the Secretary’s objection. *See* *Voge v. United States*, 844 F.2d 776, 781-82 (Fed. Cir. 1988)(BCNR acts on behalf of the Secretary of the Navy); *Miller v. Lehman*, 801 F.2d 492 (D.C. Cir. 1986)(final decision made by the Secretary); Board for Correction of Naval Records, Action by the Secretary, 32 C.F.R. § 723.7 (1997)(The Secretary “will direct such action in each case as he determines to be appropriate”); 41 Op. Att’y Gen. 94, 97 (1952)(Upon a petition to correct military records for error or injustice, responsibility for determining whether circumstances constitute an “injustice” rests solely with the Secretary.). As is the case with courts of inquiry, the findings and recommendations of BCNR are advisory only. The Secretary may grant or deny relief contrary to BCNR’s recommendation. 41 Op. Att’y Gen. 10, 11 (1948)(A correction board’s decision has “the character of advice or counsel;” the principal authorized by law to take action is the Secretary, who need not take the action recommended by the Board). The Secretary’s authority over BCNR is another example of the discretion of civil Executive Branch officials in military administrative matters.

²⁵⁵Exec. Dir., BCNR, ltr WDP:vrt of 9 Jun 87 to Thomas M. Susman (Ropes & Gray)(“[T]he appointment of officers shall be made by the President by and with the advice and consent of the Senate,” a matter “not within the power either of the Secretary of the Navy or the Board for Correction of Records.”). *See* U.S. Const. art. 2, § 2 (Presidential appointment power). BCNR does not have the power to exercise discretion constitutionally committed to the President. 41 Op. Att’y Gen. 10 (1948)(Appointment of officers can only be made by the President with the advice and consent of the Senate. The Board for Correction of Naval Records and the Secretary of the Navy do not have power to make an appointment as a remedy or correction.).

²⁵⁶*See supra*, pp. 5 nn.10-11, 23-25 and n.90.

²⁵⁷DEPSECDEF (Taft) memo (for SECNAV) of 19 Jan 89.

²⁵⁸SECDEF (Cheney) ltr Ser. 10061 (to Senator William V. Roth) of 13 Jun 90.

²⁵⁹DAJAG (Admin Law) ltr 5000 Ser. 13/IMA1128B.95 of 3 Nov 95 (“We continue to find no statutory basis . . .”).

become effective but for the death of the officer involved.²⁶⁰ The only avenue now available for the posthumous advancement of Rear Admiral Kimmel is a direct Presidential appointment, with advice and consent of the Senate, under article 2 of the Constitution.²⁶¹

Major General Short

In August 1947, Congress enacted a law to provide for advancement on the retired list of those officers who had served in the grade of Lieutenant General or General during World War II. The law authorized the President, in his discretion, with the advice and consent of the Senate, to advance such officers on the retired list to the highest grade held during the War.²⁶² Like the parallel Navy provision in the same Act, no minimum time of service in grade was specified. Major General Short was eligible for consideration under the Act.²⁶³ In the following year, Short became eligible for advancement under a second legislative provision. In June 1948 Congress enacted the *Army and Air Force Vitalization and Retirement Equalization Act*, providing, in pertinent part:

Each commissioned officer of the regular Army . . . heretofore . . . retired . . . shall be advanced on the applicable officers retired list to the highest temporary *grade in which he served satisfactorily* for not less than six months while serving on active duty, *as determined by the cognizant Secretary*, during the period September 9, 1940, to June 30, 1946 . . .²⁶⁴

Major General Short had served as a Lieutenant General from February 8, 1941 to December 16, 1941, more than eleven months. On December 2, 1948, Major General Short submitted a request to the Secretary of the Army to be advanced on the retired list to Lieutenant General, under the 1948 Act.²⁶⁵ The 1948 Act did not require Presidential appointment or advice and consent of the

²⁶⁰See DAJAG (Admin Law) ltr 1420 Ser 132/11123/7 of 1 May 87.

²⁶¹See 41 Op. Att'y Gen. 56 (1956). Such constitutional appointments do not create additional pay entitlements. COMP. GEN. DEC. B-224142, 1986 WL 64488 (Nov. 28, 1986) (Lieutenant General Ira Eaker and Lieutenant General James Doolittle were advanced to grade of General on the retired list in April 1985— military pay entitlements, however, depend on *statutory* authority); 10 U.S.C.S. § 1524 (1997) ("No person is entitled to any bonus, gratuity, pay, or allowance because of a posthumous commission or warrant.").

²⁶²Officer Personnel Act of 1947 (Aug. 7, 1947), ch. 512, § 504(d), 61 Stat. 795, 888 ("[T]he President, by and with the advice and consent of the Senate, may in his discretion extend the privilege herein granted [i.e., retirement in the highest grade or rank held while on the active list] to officers heretofore or hereafter retired, who served in the grade of general or lieutenant general between December 7, 1941, and June 30, 1946.").

²⁶³DAJA-AL 1991/2852, 11 Dec. 91.

²⁶⁴Army and Air Force Vitalization and Retirement Equalization Act of 1948, ch. 708, § 203, 62 Stat. 1081, 1085 (emphasis added).

²⁶⁵See DAJA-AL 1990/0041, 22 Jun 90

Senate.²⁶⁶ The Judge Advocate General of the Army advised that Major General Short was eligible for advancement to lieutenant general under the 1948 Act, "if it is administratively determined that he served satisfactorily in that grade for not less than six months."²⁶⁷ Congress left the question of "satisfactory service" to the determination of the Secretary.²⁶⁸ The Secretary of the Army did not act on this request during General Short's lifetime.²⁶⁹ General Short passed away on September 3, 1949.

On August 10, 1990, General Short's son, Walter D. Short, filed a petition with the Army Board for Correction of Military Records (ABCMR), requesting the posthumous advancement of General Short on the retired list under the Act of 1948.²⁷⁰ The Army Board, an instrumentality of the Secretary, like the Navy Board, accepted jurisdiction of the case on the basis of the 1948 Act. The 1948 Act allowed the Secretary of the Army to effect advancements, in his discretion—an authority for which the Navy had no parallel. Two of the three members of the Board recommended "[t]hat all of the Department of the Army records related to this case be corrected by advancing [Major General Short] . . . to the rank of lieutenant general on the retired list."²⁷¹ Writing for the Secretary, however, Deputy Assistant Secretary Matthews sided with the single dissenter, finding no error or injustice, and denying the petition.²⁷² Secretary Stone affirmed this decision in a letter to Senator Domenici, dated September 2, 1992, specifically stating his inability to find that General Short had served satisfactorily in the grade of lieutenant general for at least six months, a decision committed by law to the discretion of the Secretary.²⁷³

²⁶⁶Congress may by law waive Senate advice and consent and vest power to appoint lesser officers in executive department heads. U.S. Const. art. 2, § 2. *See also supra*, pp. 23-24 n.90.

²⁶⁷CSJAGA 1949/3757, 13 May 49; CSJAGA 1948/5133, 2 Jul 48.

²⁶⁸CSJAGA 1949/3757, 13 May 49.

²⁶⁹DAJA-AL 1990/0041, 22 Jun 90.

²⁷⁰DD Form 149 Application for Correction of Military Record in the case of Major General Walter C. Short, dated 10 Aug. 90 (Docket no. AC91-08788).

²⁷¹ABCMR Docket No. AC91-08788, 13 Nov 91.

²⁷²Mr. Matthews conveyed the decision in a pair of memos (SAMR-RB) dated December 19, 1991, to Commander, U.S. Army Reserve Personnel Center, and to the Executive Secretary, ABCMR. Specifically finding that no error or injustice had been committed, Mr. Matthews wrote that posthumous advancement of Major General Short "would reverse the course of history as adjudged by his superiors who were in a better position to evaluate the Pearl Harbor disaster."

²⁷³SECARMY ltr of 2 Sep 92 (to Senator Pete V. Domenici)(Advancement of Major General Short "would have required a conclusion by me that General Short had served satisfactorily in the grade of lieutenant general for at least six months. Absent such a determination from me, there is no authority for his advancement on the retired list. I am unable to make that determination."). On the absolute nature of the secretary's discretion in a similar case, see *Koster v. United States*, 685 F.2d 407, 413-4, 231 Ct. Cl. 301, 310-12, (1982)(Determination of satisfactory performance in temporary grade for retirement purposes was committed by law to the discretion of the secretary and could not be redetermined by court, notwithstanding plaintiff brigadier general's assertions that "he has been made to suffer for the political and public pressures that were brought to bear on the Army" and that he

Recommendations of the Army Board for the Correction of Military Records are subject to the discretion of the Secretary of the Army,²⁷⁴ just as the recommendations of BCNR are subject to the discretion of the Secretary of the Navy. With some narrow exceptions that do not apply to this case, the Boards have no independent authority. As is the case with Rear Admiral Kimmel, Major General Short was the only general officer from his era who was eligible for advancement under the 1947 and 1948 Acts, but who has not been advanced on the retired list.²⁷⁵

Some decision-making powers are committed to the Executive Branch exclusively by specific grants of authority in the Constitution, such as the power of appointments and commissions. Appointments and commissions are privileges,²⁷⁶ not remedies. Because officials charged with discretion to grant, deny, or rescind privileges do not dispense them in accord with the expectations of earnest suitors does not mean that such disappointments have been arranged through conspiracy, vindictiveness, or failure to hear and appreciate reasonable arguments. Officials who have considered the issue have believed, for one reason or another,²⁷⁷ that Rear

was "treated harshly" as "a scapegoat."). Current law also grants the Secretary of the Navy discretion to advance a retired Navy and Marine Corps officer on the retired list to the "highest officer grade in which he served satisfactorily under a temporary appointment." 10 U.S.C.S. § 6151(a)(1997). The retirement grade of three- and four-star officers today depends by law on the discretion of the Secretary of Defense. Act of Feb. 10, 1996, P.L. 104-106, Div. A, Tit. V, Subtitle A, 110 Stat. 292, amended 10 U.S.C.S. § 1370(c) (1997) by removing a provision which required O-9s and O-10s appointed under 10 U.S.C. § 601 to be nominated by the President and receive Senate confirmation to retire at three- or four-star grade. Section 1370(c) now confers discretion upon the Secretary of Defense to retire such officers at three- or four-star grade, if he "certifies in writing to the President and Congress that the officer served on active duty satisfactorily in that grade." The law does not define "satisfactorily" and provides no appeal from the Secretary's determination. As Justice Story stated in *Martin v. Mott*, 25 U.S. (12 Wheat) 19, 31 (1827), "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

²⁷⁴See Army Board for Correction of Military Records, 32 C.F.R. § 581.3(f)(2) (1997). The record of ABCMR's proceedings is forwarded to the Secretary, "who will direct such action in each case as he determines to be appropriate."

²⁷⁵The Army Center of Military History provided this information on Major General Short and advancement on the retired list of other World War II general officers. The "Thirty-six Flag Officer Petition," 22 Oct 91 (to President Bush) makes the same point about Rear Admiral Kimmel and Major General Short.

²⁷⁶See, e.g., *Kuta v. Secretary of the Army*, No. 76 C 1624, slip op. (N.D.Ill. Aug. 22, 1978) ("Service in the armed forces is a privilege and not a right."); *Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972) ("It is well-established law that military officers serve at the pleasure of the President and have no constitutional right to be promoted or retained in service and that the services of an officer may be terminated with or without reason."); *United States ex rel. Edwards v. Root*, 22 App. D.C. 419 (1903) (no right to promotion), *cert. denied*, 193 U.S. 673 (1904), *appeal dismissed*, 195 U.S. 626 (1904).

²⁷⁷Some officials have stated that Rear Admiral Kimmel or Major General Short did not perform to the standard expected of officers of their seniority (e.g., Secretary of the Navy Forrestal, Secretary of the Army Stone), and others have stated that posthumous advancement is not an appropriate "remedy" for the initial failure of the Roberts Commission to spread blame among all those who bore some responsibility for the lack of preparedness at Pearl Harbor.

Admiral Kimmel and Major General Short should not be advanced. Whatever reasons these officials have given, their decisions not to recommend Kimmel and Short for advancement on the retired list have been made in accordance with law.

Survey of Treatment of Admiral Kimmel and General Short in the Press²⁷⁸

As soon as he had finished reading the Roberts Commission report on Saturday, January 24, 1942, President Roosevelt asked if the report contained anything that would impede military operations or provide sensitive information to the enemy. Upon determining that there were no such objections to publication of the report, the President ordered that the report be released in its entirety to the press for publication in the Sunday newspapers.²⁷⁹ The headline on the front page of the New York Times on Sunday, January 25, 1942, read: "ROBERTS BOARD BLAMES KIMMEL AND SHORT; WARNINGS TO DEFEND HAWAII NOT HEEDED." A sub-headline added: "Stark and Marshall Directed Hawaii Chiefs to Prepare—Courts-Martial Likely."²⁸⁰

Almost immediately after the publication of the Roberts Commission's findings, the politically-charged quest for additional investigation of fault in Washington began. On January 27th, the New York Times reported that members of Congress of both parties had demanded a Congressional investigation, asserting that officials in Washington had been remiss in failing to follow up on actions being taken at Pearl Harbor, and charging that Army and Navy had not coordinated properly with each other at the highest levels.²⁸¹ As the press reported, the debate in Congress began immediately to take on a partisan political tone.²⁸²

²⁷⁸This section of this paper is not intended as a comprehensive survey of media treatment of Kimmel and Short; instead, it demonstrates by sampling that the basic arguments of advocates for Kimmel and Short have been in the public domain since the 1940's, and most of these arguments have their roots in heated party politics.

²⁷⁹PHA 6, at 2494; PHA 7, at 3262, 3265-66 (Congress later directed publication of the Roberts Commission's report as a public document.).

²⁸⁰James B. Reston, *Roberts Board Blames Kimmel and Short*, N.Y. TIMES, Jan. 25, 1942, at 1, col. 8. Initial reports in the German and Japanese media on the fate of Admiral Kimmel reflected an even harsher judgment of the responsibility of on-scene commanders. *E.g.*, *Nazis Cite Tokyo Report Kimmel is Ordered to Die*, N.Y. TIMES, Jan. 29, 1942, at 2, col. 5 (The German press quoted the Japanese *Times Advisor* as stating that Admiral Kimmel had been sentenced to death.).

²⁸¹*Inquiry on Hawaii Urged in Congress*, N.Y. TIMES, Jan. 27, 1942, at 4, col. 1. By the next day, a list of specific topics that many Congressmen wanted to investigate further appeared in the press, including the degree of responsibility of the Administration, and the reason messages from Washington focused on the Far East as the most likely point of attack. Arthur Krock, *Pearl Harbor Issue: Many in Congress Want Inquiry*, N.Y. TIMES, Jan. 28, 1942, at 5, col 2.

²⁸²*Republicans Push Inquiry on Hawaii*, N.Y. TIMES, Jan. 28, at 5, col 1 (Representative Whittington of Mississippi told the House that Pearl Harbor "could not be permitted to rest by finding the Hawaiian area commanders derelict in their duty." He continued, "I have come to the conclusion that there also was dereliction in

After the initial blaze of interest in additional investigation into responsibility for the disaster at Pearl Harbor in early 1942, mention of Rear Admiral Kimmel and Major General Short appeared from time to time in the press in 1943 and 1944 in connection with extension of the two-year statute of limitations for courts-martial.²⁸³ The partisan political tone of debates in Congress over courts-martial increased as the 1944 election approached, with Democrats assailing the Republicans for seeking to make a campaign issue of the evidence to embarrass the Administration, and Republicans charging that the Democrats wanted to delay potentially damaging disclosures until after the Presidential election.²⁸⁴

Information that the 1944 Army Pearl Harbor Board and Navy Court of Inquiry would clear Major General Short and Rear Admiral Kimmel began to appear in November and December 1944.²⁸⁵ Final release of the reports made front page news in August 1945, with stories reporting that the inquiries had also cited Marshall, Hull, Stark and Lieutenant General Gerow for various failures.²⁸⁶ The partisans renewed their calls for additional investigation almost immediately.²⁸⁷

the War and Navy Departments." Representative Hoffman attributed blame for the losses at Pearl Harbor to President Roosevelt: "So long as we have a Commander in Chief who claims credit for all the good things, he should not shirk his responsibility and try to pass it to someone down the line.").

²⁸³E.g., *Silent on Kimmel's Case*, N.Y. TIMES, Sept. 15, 1943, at 12, col. 6; *Plans Bill for Kimmel Trial*, N.Y. TIMES, Dec. 2, 1943, at 14, col. 5; *Votes Peace Trial on Kimmel, Short*, N.Y. TIMES, Dec. 7, 1943, at 18, col. 6; *Votes Trial Time for Pearl Harbor*, N.Y. TIMES, Dec. 8, 1943, at 9, col. 1; *Firm on Post-War Trial*, N.Y. TIMES, Dec. 10, 1943, at 16, col. 7; *Defer Pearl Harbor Case*, N.Y. TIMES, May 25, 1944, at 10, col. 1; C. P. Trussell, *Both Houses Weigh Kimmel Extension*, N.Y. TIMES, May 30, 1944, at 7, col. 1; *Delay is Favored on Court-Martial*, N.Y. TIMES, June 1, 1944, at 1, col. 2; *Votes Year Delay on Kimmel Trial*, N.Y. TIMES, June 2, 1944, at 7, col. 1 ("Explaining its shift of directives from court-martial proceedings to investigations into the facts surrounding the attack, the [Senate Judiciary] committee report stated: 'Having in mind the existing critical exigencies of total war, the committee was unwilling to add to the burdens of our biggest Army and Navy officials . . .'").

²⁸⁴Kathleen McLaughlin, *House Votes Trial for Short, Kimmel*, N.Y. TIMES, June 7, 1944, at 11, col. 8. Throughout the months leading up to the 1944 election, numerous articles appeared in the press reporting disputes in Congress over the Administration's fault for Pearl Harbor, and charges that the Administration was delaying courts-martial until after the election.

²⁸⁵E.g., *Hints Vindication of Kimmel, Short*, N.Y. TIMES, Nov. 26, 1944, at 44, col. 3; Lewis Wood, *Kimmel and Short Will Not be Tried*, N.Y. TIMES, Dec. 2, 1944, at 1, col. 7.

²⁸⁶E.g., *Army, Navy Report on Pearl Harbor; Marshall, Hull and Stark Censured*, N.Y. TIMES, Aug. 30, 1945, at 1, col. 1. The same newspaper reproduced the full texts of the Army and Navy reports in section 2. The Kimmel family cites as a grievance the government's failure to release immediately the full reports of the Navy Court of Inquiry and the Army Pearl Harbor Board. The principal findings of the Court and Board with respect to Kimmel and Short were published immediately. *Supra*, pp. 51-52 n.239. The complete records could not be published immediately due to inclusion of "Magic" intelligence and the risk of compromising such cryptologic capabilities during the war.

²⁸⁷Arthur Krock, *Pearl Harbor Questions, Congress is Likely to Seek More Light than Reports*, N.Y. TIMES, Sept. 4, 1945, at 4, col. 4; William S. White, *Congressional Inquiry Predicted As Bills Ask Pearl Harbor Action*, N.Y. TIMES, Sept. 6, 1945, at 1, col. 2.

Kimmel declined in writing Secretary Forrestal's offer of a general court-martial, in view of the pending Congressional investigation.²⁸⁸ Again, issues associated with the planned Congressional investigation stimulated lively partisan debate, with accusations that Democrats on the Committee would control the proceedings.²⁸⁹ In July 1946, after months of hearings, the press described the Joint Congressional Committee's findings as exonerating Roosevelt and determining that "the overshadowing responsibility . . . lay with the Navy and Army commanders in Hawaii," Admiral Kimmel and General Short.²⁹⁰

Years later, the press reported Admiral King's modification of his endorsement of the 1944 Navy Court of Inquiry, changing "dereliction" to "errors of judgment."²⁹¹

Additional study of news accounts could be undertaken, but a reasonable survey of reporting in the *New York Times* indicates that reporting on Kimmel and Short in the mainstream media was fairly balanced, with little evidence of vilification of them personally.²⁹² Newsworthy information about Rear Admiral Kimmel and Major General Short appeared as actions involving them occurred.²⁹³ This is not unlike the way the press treats any prominent figures. The media

²⁸⁸Kimmel Defers Bid for Court-Martial, N.Y. TIMES, Sept. 13, 1945, at 2, col. 2.

²⁸⁹C.P. Trussell, *Angry Senators Debate on 'Records' of Pearl Harbor*, N.Y. TIMES, Nov. 3, 1945, at 1, col. 6; Hannegan Says Republicans are Trying to Smear the Memory of Roosevelt, N.Y. TIMES, Nov. 18, 1945, at 2, col. 5; W. H. Lawrence, *Pearl Harbor Inquiry Enmeshed in Politics*, N.Y. TIMES, Nov. 18, 1945, Pt. IV, at 5, col. 1.

²⁹⁰William S. White, *Roosevelt Found Blameless for Pearl Harbor Disaster*, N.Y. TIMES, July 21, 1946, at 1, col. 2.

²⁹¹Modifies Blame for Pearl Harbor, N.Y. TIMES, Nov. 11, 1948, at 3, col. 6.

²⁹²To assess allegations that Rear Admiral Kimmel and Major General Short were still widely held to be solely responsible for the losses suffered at Pearl Harbor, the three service academies were requested to submit portions of any text books used to teach the event to midshipmen and cadets, and to comment on the manner in which instructors present the material. Naval Academy instructors responded that their military history survey course for all midshipmen covered too much ground to explore such issues as personal blame for Pearl Harbor; the History Department at the Academy takes no official position on responsibility for Pearl Harbor and encourages midshipmen to consider such issues for themselves. Air Force Academy instructors responded that Kimmel and Short are mentioned only briefly in an advanced course on World War II, "as links in a long chain of failure surrounding the Pearl Harbor attack." U.S. Military Academy instructors responded that their history department takes no official position on the matter and their courses do not focus on the assessment of blame for Pearl Harbor. Texts used by the U.S. Military Academy include Stephen B. Oates' *Portrait of America (from Reconstruction to the Present)* and John Keegan's *The Second World War*. The Naval Academy uses E. B. Potter's *Sea Power*; Kenneth J. Hagan's *This People's Navy*; Nathan Miller's *The U.S. Navy*; and Robert W. Love, Jr.'s *History of the U.S. Navy*. The Air Force Academy uses Larry H. Addington's *The Patterns of War Since the Eighteenth Century* and Gerhard L. Weinberg's *A World at Arms*. Inspection of relevant portions of these texts revealed that only Professor Love's text is particularly critical of Kimmel. The other texts barely mention Kimmel or Short, or include no reference to them.

²⁹³The government also provided press releases upon the occurrence of key events. See, e.g., Navy press releases of Dec. 17, 1941 (advising of Admiral Kimmel's relief of command), Feb. 7, 1942 (announcing his application for

seem to have been most interested in the heated party rivalry between Democrats and Republicans generated by the whole course of public actions arising out of the Pearl Harbor disaster.²⁹⁴ Demands for additional inquiry into the Pearl Harbor attack appeared in the press frequently during the early 1940's, openly stating the underlying political motive of impugning the Roosevelt Administration.²⁹⁵ One report suggested that Governor Dewey might have won the 1944 Presidential election had he revealed information he possessed on U.S. code-breaking capabilities and the intelligence available in Washington not provided to the commanders at Pearl Harbor.²⁹⁶ The political dimensions of the Pearl Harbor cases were constantly before the public; Republicans were diligent to ensure this. Recent advocates for Kimmel and Short have not uncovered any political secrets hitherto denied to the public. The elements of their exoneration brief appeared in the newspaper in the 1940's.

The publication of official information about Rear Admiral Kimmel and Major General Short reflects the politically charged world in which officers holding three- and four-star positions become involved by virtue of the visibility and public importance of such offices. Officials in high government positions are more susceptible to injuries to reputation as an inexorable consequence of holding such positions.²⁹⁷

retirement), Feb. 28, 1942 (advising of the Navy's acceptance of Kimmel's request to retire, "without condonation of any offense or prejudice to any future disciplinary action"), and Oct. 2, 1943 (advising of Navy and War Dept. decisions to postpone courts-martial of Kimmel and Short, and that they had waived the statute of limitations for the duration of the war). DIRNAVHIST memo 5750 Ser. AR/02848 of 1 Nov 95 (for USD(P&R)(MPP))(enclosing copies of official press releases). Navy Department records did not include additional press releases.

²⁹⁴See MARTIN V. MELOSI, *THE SHADOW OF PEARL HARBOR: POLITICAL CONTROVERSY OVER THE SURPRISE ATTACK, 1941-1946* (1977), at xi-xii, 161-168.

²⁹⁵E.g., *Hannegan Says Republicans are Trying to Smear the Memory of Roosevelt*, N.Y. TIMES, Nov. 18, 1945, at 2, col. 5; *Republicans Push Inquiry on Hawaii*, N.Y. TIMES, Jan. 28, 1942, at 5, col. 1.

²⁹⁶*Editor Says Dewey Guarded War Data*, N.Y. TIMES, Sept. 21, 1945, at 4, col. 7 (reporting on a story published in *Life* magazine). Allegedly, Governor Dewey suggested in a campaign speech that he was aware of secret information in Washington not provided to Pearl Harbor, whereupon General Marshall visited him in person and shared the information on code-breaking with Governor Dewey in a secret meeting, challenging him that revealing it would cost American lives in the ongoing war. This visit reportedly persuaded Governor Dewey to abandon the subject in his campaign.

²⁹⁷See *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978), *cert denied*, 444 U.S. 931 (1979)(Captain Arnheiter was relieved of command of U.S.S. *Vance* when senior officers concluded that he was not fit for command). See also *Secord v. Cockburn*, 747 F. Supp. 779 (D.D.C. 1990)(summary judgment against Major General Secord in defamation suit over a book alleging various illegal activities of Reagan Administration officials in Nicaragua). See generally 53 C.J.S. *Libel and Slander* § 93 (1987). Moreover, the United States has not waived sovereign immunity for intentional torts, such as defamation. See *Federal Tort Claims Act* (FTCA), codified at 28 U.S.C. §§ 2671 *et seq.* (1997), particularly §§ 2680(h) ("The provisions of this chapter . . . shall not apply to . . . any claim arising out of . . . libel, slander . . ."), 2679(b)(1)(FTCA is exclusive remedy); *United States v. Smith*, 499 U.S. 160 (1991)(FTCA is exclusive even when it bars recovery); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989)(FTCA clearly excepts defamation claims from the waiver of sovereign immunity). The following section explores more fully the natural vulnerability of high officials to public discussion and criticism.

Injury to Reputation and Official Immunity

Advocates of Kimmel and Short have complained that the commanders were not allowed sufficient opportunity to "clear their names" while their reputations were subjected to "stigma and obloquy" by the official report of the Roberts Commission.²⁹⁸ The normal remedy for injury to reputation is a suit for the tort of defamation.²⁹⁹ Following the basic rule of common law, however, executive officers of a state or the federal government enjoy absolute immunity from suits for defamation arising out of publications or statements made within the scope of their official duties, "regardless of the existence of malice . . . improper motive, bad faith, or false statement of facts."³⁰⁰ Defamatory matter subject to an absolute privilege will not support an action for defamation even if it is published maliciously and with knowledge of its falsity. A similar privilege of immunity applies to the findings of committees lawfully appointed by public authorities to make an investigation.³⁰¹ Findings and reports of investigative committees are immune from actions for defamation in so far as they deal with matters which are the subject of inquiry in the discharge of the investigative committee's duty. The President charged the Roberts Commission by executive order on December 18, 1941 to advise "whether any derelictions of duty or errors of judgment on the part of United States Army or Navy personnel contributed to such successes as were achieved by the enemy . . . and if so, what these derelictions or errors were, and who was responsible therefor."³⁰² The "dereliction of duty" finding in the Roberts Commission's report would, therefore, under general principles of law, be immune from any action for defamation, since the President specifically directed that such findings be made.

The seminal Supreme Court case on official immunity is *Barr v. Matteo*,³⁰³ a defamation case in which the Court propounded the even broader rule that federal executive officials enjoy absolute immunity from suit for *all* common law torts based on acts within the "outer perimeter" of their discretionary authority.³⁰⁴ The significance of "absolute" immunity is that "The claim of

²⁹⁸*Supra*, p. 27 n.103.

²⁹⁹*E.g.*, *Jiminez-Nieves v. United States*, 682 F.2d 1, 6 (1st Cir. 1982)(The "heartland of the tort of defamation: injury to reputation."); *Walker v. Couture*, 804 F. Supp. 1408, 1414 (D. Kan. 1992)("Damage to one's reputation is the essence and gravamen of an action for defamation.").

³⁰⁰*See generally* 53 C.J.S. *Libel and Slander* § 70 (1987), at 127. *See also* 53 C.J.S. *Libel and Slander* § 69 (1987), at 126 (including specifically official communications of military and naval officers). Under the "Speech and Debate Clause," statements made by Congressmen in session also enjoy absolute privilege (U.S. Const. art. I, § 6), and a similar absolute privilege applies to judicial proceedings (*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872)). *See* 53 C.J.S. *Libel and Slander* § 71 (1987), at 129-30.

³⁰¹*See generally* 53 C.J.S. *Libel and Slander* § 82 (1987), at 154.

³⁰²PHA23, at 1247.

³⁰³360 U.S. 564 (1959).

³⁰⁴360 U.S., at 575.

an *unworthy purpose* does not destroy the privilege.³⁰⁵ In *Barr* the Supreme Court upheld the absolute immunity of an acting federal agency head for the issuance of press releases that allegedly defamed agency employees. Barr, reacting to sharply critical comments made in the Senate (widely reported in the press and in the Congressional Record), and to inquiries from the media, issued a press release which identified two agency subordinates by name as culpable for potentially criminal payroll irregularities. Barr announced his decision to suspend immediately the two employees. In the subsequent defamation suit brought by the two employees, Barr raised as a defense that the issuance of the press release was protected by absolute privilege. In upholding Barr's claim of absolute privilege, the Supreme Court found that issuing press releases was standard agency practice, and that public announcement of personnel actions taken in response to a matter of widespread public interest was within the scope of an agency head's official duties.³⁰⁶ From a legal perspective, the key facts in *Barr* are on all fours with the key facts concerning government action in the *Kimmel* and *Short* cases, including the brief press releases provided by the Navy.³⁰⁷ The Court found that Barr was entitled to absolute immunity from a defamation action for publication of information on the agency's actions. Recognizing the implications of denying a remedy for defamation by executive officials, the Court added: "To be sure, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."³⁰⁸

Behind the common law concept of official immunity lies the belief that the public interest in information about government actions, and the need of public officials to act and speak decisively without fear of lawsuits, support an efficiency-based privilege accorded to statements public officials make in the execution of their duties. The Supreme Court in *Barr* specifically contemplated that harm to reputation might be done under a rule of absolute immunity and embraced the traditional common law of immunity as the law of the land notwithstanding.³⁰⁹ Supporting the public policy served by the common law, the *Barr* Court upheld official immunity on the grounds that government officials should be free to perform their duties and exercise the discretion pertinent to their offices "unembarrassed by the fear of damage suits—suits which would consume time and energies which would otherwise be devoted to governmental service, and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."³¹⁰ The Court stated this rationale for official immunity as strongly the previous century in *Spalding v. Vilas*,³¹¹ like *Barr*, a defamation case. The

³⁰⁵*Id* (emphasis added). See *Howard v. Lyons*, 360 U.S. 593 (1958). Cf. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

³⁰⁶360 U.S. 564, at 574-75.

³⁰⁷*Supra*, p. 61 n.293.

³⁰⁸360 U.S. 564, at 575.

³⁰⁹See also *Expeditions Unlimited v. Smithsonian Inst.*, 184 U.S. App. D.C. 397, 566 F.2d 289, 291 (D.C. Cir. 1977)(Defamation case applying the rule from *Barr*).

³¹⁰*Barr v. Matteo*, 360 U.S. 564, 571 (1959).

³¹¹161 U.S. 483, 498-99 (1896).

defendant official in *Spalding v. Vilas* was a postmaster, and in *Barr*, the Acting Director of the Office of Rent Stabilization. Within the rational framework applied by the Supreme Court, the public interest in ensuring that *military command* is "fearless, vigorous, and effective," and not encumbered with lawsuits over discretionary decisions, is particularly compelling—and that interest is most compelling in the case of command decisions made by the Commander in Chief in time of grave national crises.

The Supreme Court later held in *Butz v. Economou*³¹² that federal officials enjoyed only a qualified, good-faith immunity from suits for *constitutional* torts (known as *Bivens* actions),³¹³ but it seemed to have left intact the *Barr* rule of absolute immunity for all common law torts, including particularly defamation.³¹⁴ The Court then clarified in *Paul v. Davis* that defamation, even if it produces stigma or injury to reputation, does not rise to the level of a constitutional tort unless the defamation deprives some other constitutionally protected "liberty" or "property" interest.³¹⁵ As stated by one lower federal court, "Defamation or injury to reputation, while actionable in tort, is insufficient to invoke procedural due process guarantees."³¹⁶ More recently, the Court suggested in *Siegert v. Gilley*³¹⁷ that "no consequences, however grave, resulting from a loss of reputation can make defamation actionable as a constitutional tort."³¹⁸ Other lower federal courts have read *Siegert* as holding squarely that defamation is *never* cognizable as a constitutional tort.³¹⁹

³¹²438 U.S. 478 (1978).

³¹³Suits for constitutional torts are referred to as "*Bivens* actions" for the seminal case, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)(suit for money damages arising out of a search that was held violative of the Fourth Amendment).

³¹⁴*See, e.g.,* *Queen v. Tennessee Valley Authority*, 689 F.2d 80 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983); *George v. Kay*, 632 F.2d 1103 (4th Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981); *Sami v. United States*, 617 F.2d 755, 768 (D.C. Cir. 1979); *Granger v. Marek*, 583 F.2d 781, 784-85 (6th Cir. 1978).

³¹⁵*Paul v. Davis*, 424 U.S. 693, 701, 707-12 (1976)(respondent's photograph included in publicly distributed flyer of alleged "active shoplifters"). *See* *Binstein v. Fahner*, No. 81-C-1444, slip op. (N.D. Ill. July 6, 1982).

³¹⁶*Warmus v. Hank*, No. 5:92-CV-15, 1993 U.S. Dist. LEXIS 6855 (1993), at 8.

³¹⁷500 U.S. 226 (1991).

³¹⁸*Mahoney v. Kesery*, 976 F.2d 1054, 1061 (7th Cir. 1992)(construing *Siegert v. Gilley*).

³¹⁹*E.g.,* *Kelly v. Borough of Sayreville*, 107 F.3d 1073 (3d Cir. 1997)("[T]here is no constitutional liberty interest in one's reputation and . . . a claim that is essentially a . . . defamation claim cannot constitute a claim for violation of one's federal constitutional rights."); *Smith v. Morgan*, No. 96-1445, 1997 U.S. App. LEXIS 3106 (4th Cir. 1997); *Rohan v. ABA*, No. 95-7601, 1996 U.S. App. LEXIS 2903 (2d Cir. 1996); *Williams v. Horner*, No. 95-3811, 1996 U.S. App. LEXIS 14489 (6th Cir. 1996); *Schwartz v. Pridy*, 94 F.3d 453 (8th Cir. 1996); *Steele v. Cochran*, No. 95-35373, 1996 U.S. App. LEXIS 14648 (9th Cir. 1996); *Moore v. Agency for Int'l Dev.*, 80 F.3d 546 (D.C. Cir. 1996). *Siegert* may have modified *Pauls v. Davis* by removing the ambiguity in attempting to determine what other interest coupled with defamation might be sufficient to rise to the constitutional level—after *Siegert* defamation is simply out of the constitutional calculus. *See also* *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d

In other cases in which plaintiffs might establish the commission of constitutional torts, the Supreme Court did not leave government officials fully exposed to distracting, harassing law suits.

The Court supplemented *Butz v. Economou* by expounding the principle of "qualified immunity" for constitutional torts in *Harlow v. Fitzgerald*.³²⁰ The doctrine of qualified immunity, as explained in *Harlow*, shields government officials from personal suits based on exercise of their discretionary authority "insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." To meet this test, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."³²¹ In a defamation case the *Harlow* qualified immunity inquiry is likely never to be reached, since *Siegert v. Gilley* also requires that the existence of a constitutional violation be established as the threshold inquiry in any *Bivens* suit, and the courts have found repeatedly that defamation does not rise to the constitutional level. In a hypothetical constitutional defamation suit that could mount the forbidding *Siegert* hurdle, *Harlow* and progeny would still most likely provide immunity because defamation, given the fulsome precedents against its constitutional status, would not violate a "clearly established . . . constitutional right of which a reasonable would have known."

In *Westfall v. Erwin*,³²² a case involving a warehouse injury, the Supreme Court clarified that absolute immunity principles from *Barr v. Matteo* did not apply to *all* common law torts, holding, consistent with the common law, that absolute immunity would be available only for the exercise of decision-making discretion by government officials.³²³ Congress responded to *Westfall* immediately by enacting the *Liability Reform Act of 1988*, an amendment to the *Federal Tort Claims Act* (FTCA).³²⁴ The *Liability Reform Act* "established the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall*."³²⁵ The Act conferred such immunity on individual government employees by making an action *against the United States* under the *Federal Tort Claims Act* the *exclusive remedy* for common law torts committed by Government employees in the scope of their employment.³²⁶ In other words, the law substituted the United States as defendant for all federal officials sued in their individual capacity. The Supreme Court has held that government employees enjoy absolute

Cir. 1994)(establishment of a due process liberty interest requires "much more than a loss of employment flowing from the effects of simple defamation").

³²⁰457 U.S. 800, 817-18 (1982).

³²¹*Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

³²²484 U.S. 292 (1988).

³²³*See Barr*, 360 U.S. 564, 573 (1959).

³²⁴Codified at 28 U.S.C.S. § 2671, *et seq* (1997).

³²⁵*United States v. Smith*, 499 U.S. 160, 163 (1990).

³²⁶28 U.S.C.S. § 2679(b)(1) (1997).

immunity from common law tort actions under the *Liability Reform Act* even where the *Federal Tort Claims Act* does not provide a remedy or where the Government has a defense that precludes relief.³²⁷ The FTCA preserves absolute official immunity for the whole range of defamation-related torts, and indicates clearly that the government has also not waived sovereign immunity to allow such suits against the United States as a party. As stated in the Act,³²⁸ "The provisions of this chapter . . . shall not apply to . . . any claim arising out of . . . malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit . . ."³²⁹ The *Liability Reform Act* did exclude *Bivens* actions from the scope of the absolute official immunity it conferred, leaving the high hurdle of the *Butz*, *Harlow*, and *Siegert* line of cases undisturbed.³³⁰ Essentially, individual public officials may not be sued for defamation; the government may not be sued for defamation.

Developing from the common law in effect during the service of Kimmel and Short, the law has erected in the last forty years even more substantial hurdles to lawsuits against government officials based on stigma or injury to reputation caused by allegedly defamatory statements. When an official makes negative statements about an individual in the course of exercising the discretion attendant upon his duty, even if he makes such statements with intentional malice, the law will usually bar relief. The counterpart concept to the extensive immunity of government officials for defamation is the consequent *vulnerability* of individuals to reputation injury caused by government officials. This is the balance public policy has struck and implemented through law.³³¹ Individuals who put themselves in a position to be judged and commented upon by government officials should be aware of their heightened vulnerability. Military officers in particular serve in an environment where this vulnerability should be apparent. They control the most dangerous artificial forces on earth; they are responsible for the security of the nation; and at the three- and four-star level they are within but a few degrees of the President of the United States in the chain of command.

The Supreme Court has ruled that the scope of qualified official immunity for constitutional torts is greater as the scope of official discretion increases, as the responsibilities of allegedly offending public officials increase—the more senior the more immune.³³² The President himself enjoys absolute and permanent (i.e., surviving his term of office) immunity from civil suits

³²⁷United States v. Smith, 499 U.S. 160, 165-67 (1990).

³²⁸See 28 U.S.C.S. § 2680(h) (1997).

³²⁹See Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989)(defamation claims clearly excepted from waiver of sovereign immunity in FTCA).

³³⁰28 U.S.C.S. § 2679(b)(2) (1997).

³³¹See Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values*, 61 CHI.-KENT L. REV. 61, 66 (1985)(Correlative of official immunity is disability of individuals who might bring suit as plaintiffs—immunity is a form of "right" held by a government official; immunity is a standing "trump.").

³³²Harlow v. Fitzgerald, 457 US 800, 806-08 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Butz v. Economou, 438 U.S. 478, 511-12 (1978).

for all "acts within the 'outer perimeter' of his official responsibility," whether an alleged wrong is characterized as a constitutional tort or a common law tort.³³³

The principles of official immunity and sovereign immunity are not new. The doctrine of official immunity is part of a highly articulated common law that dates back to English law before the Revolution.³³⁴ Anyone who seeks or accepts an office exposed to comment, evaluation or discretionary decisions by senior government officials should be aware of the obvious conditions of such service. Common law defamation suits against such government officials are absolutely barred, and defamation of even hypothetically constitutional dimensions is generally not actionable. To draw in the "circle of immunity" even tighter, the Supreme Court has held that *military* personnel in particular may not bring *Bivens* constitutional actions for injuries incident to service,³³⁵ and the "*Feres* Doctrine" bars all suits by military personnel under the *Federal Tort Claims Act*, even where the Act has not already barred suits, as it has for defamation, malicious prosecution and related torts.³³⁶ The significance of the regime of immunity law applicable to defamation of military officers by other government officials is that military officers have no right to vindicate reputation under such circumstances, no right to be free of "stigma" resulting from action within the outer perimeter of the scope of discretion accorded senior federal officials in the execution of their duties.

Under principles of official immunity and sovereign immunity embedded in federal law, the findings of the Roberts Commission and all of the other investigations into the Pearl Harbor attack, and official actions and statements of President Roosevelt, Secretary Knox, Secretary Stimson, Secretary Forrester, Admiral King, General Marshall, and other key government officials would be absolutely privileged against any legal remedy for defamation, even if such statements, hypothetically, were known to be false when made.

³³³Nixon v. Fitzgerald, 457 U.S. 731, 749, 756 (1982). See Brief for the United States as Amicus Curiae in Support of Petitioner, Clinton v. Jones (No. 95-1853)(Aug. 8, 1996)(on writ of certiorari issued to the United States Court of Appeals for the Eighth Circuit).

³³⁴See Nixon v. Fitzgerald, 457 U.S. 731, 747-750 (1982)("[O]ur immunity decisions have been informed by the common law."); Butz v. Economou, 438 U.S. 478, 508 (1978); Spalding v. Vilas, 161 U.S. 483, 492-98 (1896). See also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, at 418-19 (1st ed. 1833)("The president cannot . . . be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."). See generally RESTATEMENT (SECOND) OF TORTS § 895D (1979)(immunity of public officers); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 1059-60 (5th ed. 1984).

³³⁵Chappell v. Wallace, 462 U.S. 296 (1983); United States v. Stanley, 483 U.S. 669 (1987).

³³⁶Feres v. United States, 340 U.S. 135, 146 (1950)("[T]he Government is not liable under the *Federal Tort Claims Act* for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."). See Chappell v. Wallace, 462 U.S. 296, 299 (1983)(Feres doctrine based on the corrosive effect lawsuits would have on military discipline).

Media Exposure of Public Officials and Public Figures

The common law of defamation has long provided public officials, including military officers, a diminished degree of protection from criticism by the public.³³⁷ In *New York Times v. Sullivan*³³⁸ the Supreme Court recognized special First Amendment concerns with suits for defamation against private defendants by public officials, erecting a substantial additional hurdle of proof for public official plaintiffs—the demonstration of “actual malice.”³³⁹ The *New York Times* case represents a shift in the common law balance of interests even farther away from the aggrieved individual public official to the greater values to be preserved in freedom of speech about government, unencumbered by fear of lawsuits. The Court in *New York Times* recognized that debate on public issues might well include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³⁴⁰ The Court intended to deter “libel suits brought by public officials who objected to criticisms of their official conduct.”³⁴¹ One study estimated that only ten percent of public-figure defamation plaintiffs prevail under the actual malice rule.³⁴² The principles relied upon in the *New York Times* case trace back to the founding of the nation³⁴³ and have been reaffirmed by the Supreme Court in cases of extreme criticism and tasteless satire.³⁴⁴

A modern case illustrative of the diminished defamation protection afforded military officials is *Arnheiter v. Random House*.³⁴⁵ Captain Arnheiter, relieved of command of a naval vessel by superior officers who believed him unfit for command, sued for defamation the author and publisher of a book on the incident, *The Arnheiter Affair*. Affirming the trial court's summary

³³⁷See 53 C.J.S. *Libel and Slander* § 70 (1987), at 127.

³³⁸376 U.S. 254 (1964).

³³⁹Under the “actual malice,” standard, adapted from the common law standard of “malice,” “One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct . . . [or] fitness . . . is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.” Plaintiff’s proof of these elements of liability must meet the higher evidentiary standard of “clear and convincing evidence.” RESTATEMENT (SECOND) OF TORTS § 580A (1977).

³⁴⁰376 U.S., at 270.

³⁴¹Nicole B. Casarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 667, 692 (1994)(Court’s intention to deter libel suits by spawning “a litigation system in which few public figure libel plaintiffs could prevail on the merits.”); Seth Goodchild, Note, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L. J. 315, 333 (1986).

³⁴²R. BEZANSON, G. CRANBERG & J. SOLOSKI, *LIBEL LAW AND THE PRESS* 122 (1987).

³⁴³See *New York Times v. Sullivan*, 376 U.S. 254, 269-77 (1964).

³⁴⁴E.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

³⁴⁵578 F.2d 804 (9th Cir. 1978).

dismissal of Arnheiter's claim, the circuit court observed that "The commanding officer of a United States Navy vessel during war is in control of governmental activity of the most sensitive nature. Such a person holds a position that invites public scrutiny and discussion and fits the description of a public official under *New York Times* Arnheiter's removal from command of a war vessel implicated critical issues of public concern, i.e., military decision-making in the conduct of war, and the selection of those entrusted with our national defense. Arnheiter did much more than seek reversal of his removal. He used every conceivable effort to gain public exposure and to make his case a 'cause celebre'. . . . Under these conditions, we hold that Arnheiter qualifies under both the public official and public figure³⁴⁶ tests and that the book must be judged against the *New York Times* standard of actual malice."³⁴⁷ The reasoning of the *Arnheiter* court applies with even greater force to Rear Admiral Kimmel and Major General Short, the commanders who presided over forces destroyed at Pearl Harbor, and one of them the second ranking officer in the Navy.

Government, like the military, is not an abstract, autonomous entity; it consists of people. Criticism of government necessarily includes criticism of people and their actions. As the Court stated in *Garrison v. Louisiana*, "Of course any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed."³⁴⁸ In fact, there is substantial authority that aggressive media reporting on high officials better serves the public and may even be fundamental to the maintenance of a free society; accordingly, the courts have been particularly cautious to protect critical statements about the highest government officials.³⁴⁹

Under a separate principle of common law, accurate reports of official governmental proceedings (such as officer personnel actions and the findings of investigations, such as the Roberts Commission investigation) enjoy immunity from suits for defamation.³⁵⁰ Publication of such reports by the media is also privileged.³⁵¹

³⁴⁶E.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)(Public figures are "those who assume special roles of prominence in society" or who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."); *Curtis Pub. Co. v. Butz*, 388 U.S. 130 (1967)(seminal "public figure" case). Public figures are subject to the same "actual malice" standard as public officials.

³⁴⁷*Arnheiter v. Random House*, 578 F.2d 804, 805-06 (9th Cir. 1978); *Arnheiter v. Sheehan*, 607 F.2d 994 (2d Cir. 1979)(accord).

³⁴⁸379 U.S. 64, 76 (1964).

³⁴⁹See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)("Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."); *Garrison v. Louisiana*, 397 U.S. 64, 76 (1964)("The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants."); *New York Times v. Sullivan*, 376 U.S. 254, 273-80 (1964).

³⁵⁰See, e.g., *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88-89 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981)(cited with approval in *White v. Fraternal Order of Police*, 909 F.2d 512, 527 (D.C. Cir. 1990) and *Secord v. Cockburn*, 747 F. Supp. 779, 783 (D.D.C. 1990)). Cf. Annotation, *Libel and Slander: Proceedings, Presentments*,

Vulnerability to public scrutiny and criticism, some of which may be half-truths, misinformation, satire, or inartful fiction, inheres in high public office. That the law so clearly leaves the reputations of public officials vulnerable to criticism by other officials and the media is one of the conditions under which public offices are held. This greater vulnerability of reputation to significant injury does not somehow "amend" the Constitution by altering in some compensating way the powers of the President and his deputies. The Commander in Chief may investigate, relieve, reassign or prosecute flag and general officers notwithstanding the inevitability of public interest. The law does not make exceptions for the thin-skinned or for those who fail to anticipate their potential exposure to embarrassment after a long career in a semi-closed society in which respect is mandated by criminal law. The alleged injury to Rear Admiral Kimmel's and Major General Short's reputations would not be remediable under the law that applies to others similarly situated. As the Supreme Court suggested in *New York Times v. Sullivan*, the law that protects reputation assumes that high public officials should be treated as "men of fortitude, able to thrive in a hardy climate."³⁵²

Official Actions Have Already Provided the Remedy

Kimmel's counsel, Charles B. Rugg, stated publicly that the Navy Court of Inquiry, including the comments of Secretary Forrestal, had corrected the Roberts Commission's finding of dereliction, reported in the press as follows:

Kimmel Cleared, Says Lawyer

BOSTON, Dec. 1—Charles B. Rugg, counsel for Rear Admiral Husband E. Kimmel, declared here tonight that "the statement of Secretary of the Navy Forrestal means that Admiral Kimmel has been cleared" of charges of dereliction of duty at Pearl Harbor.³⁵³

Investigations, and Reports of Grand Jury as Privileged, 48 A.L.R.2d 716 (1956). The accuracy qualification applies to the accuracy of the recordation of the allegedly defamatory material (such as the accuracy of the transcription of finding 17, the dereliction finding, in the Roberts Commission report); the qualification does not apply to the underlying fact-accuracy of the governmental findings or proceedings themselves.

³⁵¹*E.g.*, *Secord v. Cockburn*, 747 F. Supp. 779, 783 (D.D.C. 1990) (Ruling against Major General Richard Secord in his defamation suit against various authors and publishers for publication of a book critical of his role in the "Iran-Contra Scandal," the Court noted that "passages will not be actionable if subject to certain common-law privileges" including "the privilege for publication of accurate reports of official governmental proceedings.").

³⁵²*New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

³⁵³N.Y. TIMES, Dec. 2, 1944, at 5, col. 6.

President Truman, after reading the 1944 Army and Navy Pearl Harbor reports, stated publicly that the whole country shared in the blame for the disaster at Pearl Harbor, given the widespread resistance to preparations for war.³⁵⁴ President Truman also stated that he had no intention of ordering courts-martial for any of the officers involved in the Pearl Harbor disaster, but that he would "see to it that any one of them could have a fair and open trial if they wanted one."³⁵⁵ Rear Admiral Kimmel, however, declined a court-martial *in writing* to Secretary Forrestal, deferring to the pending Congressional investigation,³⁵⁶ arranged largely, or so Kimmel claimed, through the efforts of his counsel, Charles Rugg.³⁵⁷

The Joint Committee on the Investigation of the Pearl Harbor Attack (JCC) completed its final report on July 16, 1946³⁵⁸ and provided it to the press immediately.³⁵⁹ The Congressional report clearly did not single out Kimmel and Short to bear all of the blame for Pearl Harbor.³⁶⁰

³⁵⁴Felix Belair, Jr., *Truman Says Public Must Share Blame for Pearl Harbor*, N.Y. TIMES, Aug. 31, 1945, at 1, col. 1.

³⁵⁵*Id.*

³⁵⁶*Kimmel Defers Bid for Court-Martial*, N.Y. TIMES, Sept. 13, 1945, at 2, col. 2. In a letter to Rear Admiral Kimmel dated August 28, 1945, Secretary Forrestal wrote: "I am disposed to order your trial by General Court-Martial in open court in the event that you still desire to be so tried." PHA19, at 3944. Kimmel responded: "In view of the agitation for a Congressional Investigation before Congress reconvened and the action of the Senate in ordering a joint Congressional Investigation of Pearl Harbor, I wish to defer my reply to your letter of August 28, 1945 until that investigation is completed." PHA19, at 3943. On advice of counsel, Charles Rugg, Kimmel had previously declined to participate in the Hart Investigation (104 CONG. REC. app. A6997 (Aug. 5, 1958); Husband E. Kimmel, *Admiral Kimmel's Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 157)), in which Secretary of the Navy Knox had ordered Hart to afford Kimmel "the right to be present, to have counsel, to introduce, examine, and cross-examine witnesses, to introduce matter pertinent to the examination and to testify or declare in his own behalf at his own request." PHA26, at 4. On advice of counsel, Kimmel made a tactical decision in both instances to forego opportunities for enhanced "due process." Despite these rejected opportunities, Kimmel and his counsel continued to complain later about "star chamber" proceedings that did not afford him basic "due process" rights. During the War, Kimmel himself admitted that a public court-martial would have been damaging to the war effort. *Asks Trial At Once For Pearl Harbor*, N.Y. TIMES, Oct. 12, 1943, at 11, col. 1 (Representative Cole, New York Republican, demanded immediate courts-martial; Admiral Kimmel stated, "I realize that a court-martial at this time could only be had at the expense of the war effort because of the resulting interferences with the very important duties of essential witnesses of high rank . . .").

³⁵⁷Husband E. Kimmel, *Admiral Kimmel's Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 159.

³⁵⁸REPORT OF THE JOINT COMMITTEE ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK, PURSUANT TO S. CON. RES. 27, 79th Cong. (Letter of Transmittal from Committee Chairman and Vice-Chairman to Speaker pro tempore of the Senate and Speaker of the House, dated July 16, 1946).

³⁵⁹*E.g.*, William S. White, *Disaster Onus Put on Kimmel, Short*, N.Y. TIMES, July 16, 1946, at 1, col. 3; William S. White, *Roosevelt Found Blameless for Pearl Harbor Disaster*, N.Y. TIMES, July 21, 1946, at 1, col. 2.

³⁶⁰*E.g.*, "While the primary responsibility for the severe initial defeat suffered by the United States at Pearl Harbor is put in the majority report upon Rear Admiral Husband E. Kimmel, then Commanding the Pacific Fleet, and

Major General Short issued a statement from his home in Texas indicating his satisfaction at the conclusion of the hearings: "I am satisfied that the testimony presented at the hearings fully absolved me from any blame and I believe such will be the verdict of history. As I have stated before, my conscience is clear."³⁶¹

Dissatisfied with the results of the JCC hearings, however, Rear Admiral Kimmel blamed political intrigue by the Democrats, Committee Counsel (William D. Mitchell), Presidential orders issued by the Truman administration,³⁶² Committee staff prejudiced in favor of the administration, and failure of the Congressional Committee to call all of the witnesses that he, Rear Admiral Kimmel, had determined that it should call.³⁶³ After months of hearings and thousands of pages of testimony and exhibits, collected in 40 full-sized, bound volumes, the JCC still found that the Hawaiian commands bore the principal fault, by failing:

(a) To discharge their responsibilities in the light of the warnings received from Washington, other information possessed by them, and the principle of command by mutual cooperation.

(b) To integrate and coordinate their facilities for defense and to alert properly the Army and Navy establishments in Hawaii, particularly in the light of the warnings and intelligence available to them during the period November 27 to December 7, 1941.

(c) To effect liaison on a basis designed to acquaint each of them with the operations of the other, which was necessary to their joint security, and to exchange fully all significant intelligence.

(d) To maintain a more effective reconnaissance within the limits of their equipment.

(e) To effect a state of readiness throughout the Army and Navy establishments designed to meet all possible attacks.

(f) To employ the facilities, material, and personnel at their command, which were adequate at least to have greatly minimized the effects of the attack, in repelling the Japanese raiders.

(g) To appreciate the significance of intelligence and other information available to them.³⁶⁴

Maj. Gen. Walter C. Short, in Army command at Hawaii, the War and Navy Departments do not escape censure." William S. White, *Disaster Onus Put on Kimmel, Short*, N.Y. TIMES, July 16, 1946, at 1, col. 3, and at 2, col. 4.

³⁶¹Short Reiterates Stand, N.Y. TIMES, July 21, 1946, at 12, col. 6.

³⁶²Kimmel did not identify the presidential orders to which he took exception. President Truman did specifically direct in a series of memoranda that all information material to the investigation be provided to the Committee, including information relating to cryptanalytic activities, and that any witnesses with relevant information come forward. See JCC, Appendix C, at 285-87. The Joint Congressional Committee considered all of the various intelligence matters which had not been provided to Kimmel and Short before the attack at Pearl Harbor, but which had been available in Washington.

³⁶³Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS AND WORLD REPORT, Dec. 10, 1954, at 159 (referring, in the concluding sentence, to authorities in Washington as "criminal.").

³⁶⁴JCC, at 252.

The JCC report stated specifically that “The errors made by the Hawaiian commands were errors of judgment, and not derelictions of duty.”³⁶⁵ The press reported this finding prominently.³⁶⁶ The findings of the JCC stand as final, official “corrections” of the original finding of “dereliction of duty” in the Roberts Commission’s report.

Executive Discretion: the Controlling Constitutional Principle

Kimmel and Short advocates have complained that the commanders were denied due process, that they were not allowed representation by counsel, to cross-examine witnesses, or to air their version of events publicly,³⁶⁷ and that there is therefore error in the associated personnel actions taken against them and in the many investigations of the attack on Pearl Harbor. The government, however, has taken no action against Kimmel or Short that entitled either of them to due process. The actions taken by the government include Secretary Knox’s initial investigation of the disaster at Pearl Harbor for the President; the decision to relieve Admiral Kimmel and Lieutenant General Short of command; the decision of the President to order a more thorough inquiry, presided over by a sitting Supreme Court Justice;³⁶⁸ the acceptance of Kimmel’s and Short’s offers to retire; the conduct of additional investigations amidst the din of partisan accusations and global war; the postponement of decision on courts-martial to protect vital cryptologic capabilities and keep America’s admirals and generals engaged in combat; the release of information to the public on actions being taken in the wake of the worst military disaster in American history; the President’s and Secretaries’ *discretionary* decisions with respect to the appropriate action to take against Admiral Stark, General Marshall, General MacArthur and other subordinate officials; and decisions not to advance Kimmel or Short on the retired list.³⁶⁹

³⁶⁵*Id.*

³⁶⁶*E.g.*, William S. White, *Roosevelt Found Blameless for Pearl Harbor Disaster*, N.Y. TIMES, July 21, 1945, at 1, col. 2, and at 12, col. 2.

³⁶⁷But see *supra*, p. 39 n.160.

³⁶⁸The appointment of Justice Owen Roberts to head the Roberts Commission’s initial investigation into the attack on Pearl Harbor was a significant step taken to ensure the integrity of the investigation. The integrity of the investigation might have been questioned if an Executive Branch official had been appointed to head the Commission. To insulate them from political influence, the Constitution provides that federal judges enjoy life tenure and their salaries may not be reduced while in office. U.S. Const. art 3, § 1. Additionally, no credible investigation of the Pearl Harbor attack could have been conducted without the participation of the military commanders in charge on Oahu. PHA7, at 3267.

³⁶⁹The Kimmels have also alleged that the Navy Department threatened “to take away construction contracts from Frederick R. Harris, Inc., a naval contractor, if they [sic] continued to employ Admiral Kimmel” after he had retired. Edward R. Kimmel ltr of 26 Sep 95 (to USD(P&R))(enclosing a list of grievances dated February 26, 1995). The Kimmels have not produced a copy of correspondence or any other evidence to support this allegation. The complaint may allude to standards of conduct warnings. Rear Admiral Jacobs stated the official position of the Navy in CHNAVPERs ltr Pers 10-MLT of 16 Jun 42 (RADM Jacobs to RADM Kimmel), which approved Kimmel’s employment “provided you will not be engaged in selling or contracting or negotiating for the sale of

Whatever grievances Rear Admiral Kimmel and Major General Short might have had against these actions, they are not recognized or remediable at law.

Kimmel's advocates have focused on the findings of the Court of Inquiry, that Rear Admiral Kimmel was not derelict in the performance of his duties. Similarly, they have emphasized the failure to provide courts-martial (apparently unaware that Kimmel refused the offer of a court-martial), implying that courts-martial would have produced acquittals. Perhaps so, but the discretion of the President and senior officials in the military chain of command to weigh evidence and make determinations about the quality of Rear Admiral Kimmel's and Major General Short's judgment, and their suitability for three- and four-star rank, has never been coterminous with the question of guilt of a criminal offense. As stated by Admiral Carlisle Trost in 1988 while serving as Chief of Naval Operations, "there is a vast difference between a degree of fault which does not warrant a punitive action and a level of performance which would warrant bestowal of a privilege."³⁷⁰

In the selection of two-star officers for advancement to three- and four-star grade, superior judgment and performance are touchstones. The President and his principal subordinate officials in the Executive Branch make such determinations on the basis of nonjusticiable constitutional discretion. There is no adjudicative forum in which a final judgment of "appointment" may be won, nor may Congress compel an appointment by legislative act.³⁷¹ Three- or four-star rank is not a *personal attribute*; it is a public office. Advancement to such rank is not a "remedy;" it is the investiture of enhanced authority to facilitate the execution of increased responsibilities. The conclusion has been reached numerous times that Admiral Kimmel and Lieutenant General Short's execution of such increased responsibilities did not rise to the

naval supplies and war material to the Navy or to the Navy Department." Rear Admiral Jacobs' letter to Rear Admiral Kimmel enclosed a legal memorandum that addressed the limitations on post-retirement employment with government contractors. Similar limitations, or "standards of conduct," are still in effect today. See *Standards of Conduct*, Digest of Laws, 32 C.F.R. § 721.15(c)(1)(ii) (1997). Otherwise, the Navy publicly defended Kimmel's right to receive retired pay and to accept post-retirement employment with Harris, Inc. See *Navy Justifies Pay Received by Kimmel; Department also Backs Right to Accept Civilian Post*, N.Y. TIMES, Aug. 11, 1942, at 4, col. 2. There has never been an issue of wrongful denial of compensation in the cases of the Pearl Harbor commanders. The Act under which Rear Admiral Kimmel had been advanced temporarily to the grade of Admiral (Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89) provided specifically that officers who returned to their regular ranks after being detached from temporary promotion billets would receive only the pay and allowances of their regular rank. Pursuant to an Act of May 20, 1958, 72 Stat. 122, 130, Rear Admiral Kimmel's retired pay was recomputed in accordance with a complex statutory formula, and he received thereafter retired pay comparable to that of a retired three-star admiral. Congress did not base eligibility for recomputation of retired pay under the 1958 Act on discretionary selection of individuals; no one attempted to deny Rear Admiral Kimmel this benefit to which he was entitled by law. See *Dorn Report (Staff Study)*, at I-1. A fire at the National Personnel Records Center destroyed Major General Short's pay records in 1973. Neither Major General Short nor any of his survivors has ever claimed that the government denied Short due compensation before his death in 1949.

³⁷⁰*Supra*, p. 46 n.210.

³⁷¹See, e.g., 41 Op. Att'y Gen. 291, 292 (1956) ("Congress may not, in connection with military appointments or promotions to higher offices, control the President's discretion to the extent of compelling him to commission or promote a designated individual.").

level expected of officers serving in three- or four-star rank. As stated by Secretary Forrestal, Kimmel "failed to demonstrate the superior judgment necessary for exercising command commensurate with [his] rank and . . . assigned duties."³⁷² In declining to recommend Major General Short for advancement on the retired list, Secretary of the Army Stone stated in 1992 that he was "unable to make th[e] determination" "that General Short had served satisfactorily in the grade of lieutenant general."³⁷³ The freedom to make such judgments inheres in executive office.

Failure to advance Kimmel and Short does not signify that they were *solely* responsible for Pearl Harbor, nor does it reattach to them the badge of "dereliction," long since officially removed through the findings of various investigations and endorsements. The fact that executive discretion supported the advancement of *other* officers on the retired list, or that Roosevelt decided to allow other officers to continue serving (who thereafter distinguished themselves during the War), is not legally relevant to any decision made with respect to Rear Admiral Kimmel and Major General Short.³⁷⁴ They must be judged on their own merits.³⁷⁵ There is no

³⁷²PHA16, at 2429.

³⁷³SECARMY ltr of 2 Sep. 92 (to Senator Pete V. Domenici).

³⁷⁴As long as actions taken in an individual case are within the limits defined by law, comparison to other cases does not give rise to any issue on appeal—with one exception. The only possible claim of "selective prosecution" that might be recognized by law would be rooted in the principle of equal protection implicit in the Due Process Clause of the Fifth Amendment. *Schlesinger v. Ballard*, 419 U.S. 498, 500 (1975)(Although the Fourteenth Amendment's Equal Protection Clause applies only to the states, the Fifth Amendment Due Process Clause contains an equal protection element); *Woodard v. Marsh*, 658 F.2d 989 (5th Cir. 1981)(citing *Rostker v. Goldberg*, 453 U.S. 57 (1981)(The due process clause of the Fifth Amendment has generally been held to make Fourteenth Amendment equal protection law applicable to the federal government.)). In the context of "selective prosecution," the equal protection principle does not guarantee equal *results* for all. A successful "selective prosecution" claim must demonstrate that the claimant was "similarly situated" with respect to others who received more favorable treatment, and that discrimination against him was based on a constitutionally impermissible ground. The lead case, *Wayte v. United States*, 470 U.S. 598 (1984), spells out these principles. The Kimmel and Short cases cannot meet the standards prescribed for "selective prosecution" claims, because the principle applies only in criminal cases, Kimmel and Short were not "similarly situated" with respect to other officials in Washington or elsewhere (the various senior officers to whom fault has been attributed had profoundly different duties, different experience, and different skills, as assessed by the President), and there has been no discrimination against Rear Admiral Kimmel or Major General Short on a "constitutionally impermissible basis" (narrowly confined by equal protection precedent to such bases as race, religion, ethnicity, or retaliation for the exercise of individual constitutional rights, such as freedom of speech). See *United States v. Hagen*, 25 M.J. 78, 83 (CMA 1987); *United States v. Means*, 10 M.J. 162, 165-66 (CMA 1981). In the absence of discrimination on a constitutionally impermissible basis, the law is well-settled that there is no claim to "comparative justice." Different cases may have different results and no individual may claim a right to reformation of his treatment on the basis of more favorable treatment of others. *E.g.*, *Woodard v. Marsh*, 658 F.2d 989, 993-94 (5th Cir. 1981)(Military officials were entitled to unreviewable discretion in deciding to retain some officers and separate others for failure to meet the same training criteria; plaintiff's Equal Protection claim rejected); *United States v. Vita*, 209 F. Supp. 172, 174 (E.D.N.Y. 1962)("There is no requirement under the due process clause or any other clause of the Constitution which imposes a mandate upon the Court to render uniform sentences . . ."); *State v. Griffin*, 122 Idaho 733, 828 P.2d 862 (1992).

The President's paramount constitutional power as Commander in Chief to retain particular subordinate military officers of his selection in key command positions establishes per se that officers not so selected are not "similarly situated." Admiral King stated to Kimmel that President Roosevelt personally determined that the services of General Marshall and Admiral Stark were indispensable to the war effort after Pearl Harbor. See

Husband E. Kimmel, *Memorandum of Interview with Admiral King in Washington on Thursday, 7 December 1944*, at 1 (enclosed with Thomas K. Kimmel ltr of 19 Oct 95 (to USD(P&R)); Selections from Manuscript Collection 37, Ernest J. King Papers, Naval Historical Collection, Naval War College (assembled by Walter Muir Whitehall and Thomas B. Buell) (King reported that Roosevelt was personally involved in Stark's reassignment as CINCUSNAVEUR)); Forrest C. Pogue, *Marshall on Civil-Military Relations*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES* 206 (Richard H. Kohn ed., 1991)(Roosevelt stated that he could not sleep at night with General Marshall out of the country). The President, as Commander in Chief, was entitled constitutionally to continue employing Marshall, Stark, MacArthur and Turner in the military capacity he deemed appropriate, without reference to whatever jealousies their assignments might generate. *E.g.*, HAROLD F. BASS, JR., ET AL., *POWERS OF THE PRESIDENCY* 167 (1989)("[T]he power to assign military officers to posts . . . gives presidents the opportunity to shape the leadership of the military."); CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 2 (1976)("The . . . appointment and removal of 'high brass' . . . are matters over which no court would or could exercise the slightest measure of judgment or restraint."); LEWIS W. KOENIG, *THE CHIEF EXECUTIVE* 242-43 (3d ed. 1975)("As Commander-in-Chief the President appoints and removes his field generals."); LOUIS SMITH, *AMERICAN DEMOCRACY AND MILITARY POWER* 48 (1951)("[T]he President . . . may at his discretion remove any officer from a position of command.").

³⁷⁵Kimmel's counsel has criticized "the scapegoat approach to assessing responsibility for a national calamity by the process of hastily fixing sole responsibility on the Army or Navy commander at the scene of its impact." Edward B. Hanify (Ropes & Gray) memo for DIRNAVHIST (OP-09BH) of 23 Dec 87, at 2. This paper has not explored the principle of strict accountability of officers in command, because no official ever held Rear Admiral Kimmel or Major General Short accountable under the theory of "strict liability" traditionally applicable to officers in command. *See* U.S. Navy Regulations, art. 0802 (1990)("The responsibility of the commanding officer for his or her command is absolute While the commanding officer may, at his or her discretion, . . . delegate authority to subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of continued responsibility for the safety, well-being and efficiency of the entire command."); Sen. Malcolm Wallop ltr of 31 Jan 92 (to Mr. and Mrs. Edward Kimmel)("Officers who accept the privileges and benefits of high rank must also accept accountability for what happens to their commands, even when they might not be directly at fault. This principle of command responsibility is the bedrock upon which all military discipline rests. It is particularly prominent in the U.S. Navy, which holds the commander of a vessel accountable if his ship runs aground or collides with another ship, even if he is not on the bridge at the time."). *Cf.* U.S. Navy Regulations, art. 182(6) (1920). The "doctrine" of accountability does not depend on personal fault. The actions taken with respect to Kimmel and Short, however, did not depend on the principle of strict accountability, but on discretionary assessments of the commanders' actual conduct, failure to act, or ability to command effectively. Officials who have acted in the Kimmel and Short cases have indeed resisted attempts to shift responsibility for the faults of the on-scene commanders to higher levels in the chain of command, not as a cover-up but for principled reasons. *E.g.*, *Official Report of the Secretary of War Regarding the Pearl Harbor Disaster*, Dec. 1, 1944, PHA 35, at 14 (Secretary Stimson rejected the shifting of responsibility to higher levels of command, referring to the Army's long-standing "policy of decentralized responsibility." As Stimson wrote, "It has been and still is the prevailing policy and practice of the . . . Army to choose with care as commanding officers of the various theaters men whose record and experience indicate their capabilities for the command and to place upon them the responsibility for the performance of their mission with as little interference from the central Army authorities in Washington as possible."). This policy encourages independence and autonomy in the field, values useful in combat, while discouraging umbilical dependence on higher authority.

In legal proceedings, the responsibility of an on-scene commander is measured by what he did with what he had, in terms of both knowledge and resources, not by what he might have done had he been given more by higher authority. The latter standard would lead in every case to a finding of no responsibility for local commanders based on their hypothetical *ex post facto* assertions of what they *would* have done "if only" *E.g.*, Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. NEWS & WORLD REP., Dec. 10, 1954, at 149("No man can state as a fact that he would have taken a certain course of action years ago had he known facts which were then unknown to him. All he can give is his present conviction Had I learned these vital facts and the "ships in harbor" messages on November 28th, it is my present conviction that I would have rejected the

Navy Department's suggestion to send carriers to Wake and Midway. I would have ordered the third carrier, the *Saratoga*, back from the West Coast. I would have gone to sea with the Fleet and endeavored to keep it in an intercepting position at sea." A method of assigning responsibility that encouraged *ex post* "if onlies" would promote such petulant resource-demanding delay and timidity as that exhibited repeatedly by General McClellan before Lincoln finally relieved him. See, e.g., JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 365, 426, 464, 468-70, 570 (1988). Under an "if only . . ." standard of accountability, responsible commanders could "seed" the record with unrealistic demands for resources not reasonably available in order to set up in advance their defenses against accountability. Wisely, the standard is, instead, what was done with what was available to the commander. Thus Secretary Stimson assessed the conduct of General Short: "I find that he failed *in the light of information which he had received* adequately to alert his command to the degree of preparedness which the situation demanded; and this failure contributed measurably to the extent of the disaster, although much damage probably would have resulted from the attack in any event." *Official Report of the Secretary of War Regarding the Pearl Harbor Disaster*, Dec. 1, 1944, PHA 35, at 15 (emphasis added). Notice that the Secretary did not fault General Short for failing to avert the attack; he did not hold him to a standard of superhuman prescience regarding information and resources not available to him. Instead, he faulted him for what he did and did not do with what he had. The Roberts Commission premised its finding of dereliction of duty on this standard. PHA 7, at 3285 ("In light of the warnings and directions to take appropriate action, transmitted to both commanders between November 27 and December 7 . . ."). Similarly, Secretary Forrestal in his endorsement of the Navy Court of Inquiry concurred with Admiral King that "the pertinent question is whether Admiral Kimmel used the means available to the best advantage," notwithstanding unavoidable shortages in personnel and material, and that "the information available to Admiral Kimmel called for a tightening up of the defense precautions." PHA 16, at 2403, 2405 (emphasis added). Secretary Forrestal's endorsement, citing the endorsement of the Judge Advocate General, the Hewitt Investigation, and other sources, is filled with appropriate qualifying references to information and resources available to Admiral Kimmel. E.g., PHA 16, at 2408 (" . . . information . . . which was received by Admiral Kimmel during the week preceding the attack, coupled with all the other information which he had received . . . ") (" . . . after considering all of the information that was at Admiral Kimmel's disposal . . . "), 2414 ("The information which was received by Admiral Kimmel during the first week of December 1941 . . ."), 2427 (" . . . from the information available to them . . . "). *In pari materia* with Secretary Stimson's official report on the Army investigation, Secretary Forrestal did not hold Kimmel responsible for failing to avert the Japanese attack; instead, he held him responsible for failing to take reasonable measures within his grasp: "[T]here were, nevertheless, areas in which sound military judgment dictated the taking of action which, though it might not have prevented or defeated the attack, would have tended materially to reduce the damage which the attack was able to inflict. Such action was not taken . . ." PHA 16, at 2419. Similarly, the JCC report based its findings of fault on "information possessed by them" [the Hawaiian commands], finding that the commanders failed "To employ the facilities, matériel, and personnel at their command, which were adequate at least to have greatly minimized the effects of the attack . . ." The JCC report also found that the commanders had failed "To appreciate the significance of intelligence and other information available to them." JCC, at 252 (emphasis added). In his recent review of government actions taken with respect to Admiral Kimmel and General Short, Dr. Edwin Dorn, Under Secretary of Defense (Personnel and Readiness) applied the same situationally sensitive standard: "The intelligence available to Admiral Kimmel and General Short was sufficient to justify a higher level of vigilance than they chose to maintain . . . [T]hey had the resources to maintain a higher level of vigilance." *Dorn Report*, at 4 (emphasis added). See also *Dorn Report (Staff Report)*, at III-15 ("[T]he commanders in Hawaii failed to make adequate preparations in light of the information they had . . ."). Cf. David Kaiser, *Conspiracy or Cock-up? Pearl Harbor Revisited*, 9 INTEL AND NAT'L SECURITY 354, 368 (1994) (comparing actions taken by Kimmel and Short to more vigorous responses by other area commanders who received the same war warning messages); WILLIAM F. HALSEY, *ADMIRAL HALSEY'S STORY* 75-76 (1947) (Based on the Navy "war warning" message, shown to Halsey by Kimmel before Halsey sailed, Halsey placed his carrier task force on a war alert status, instituting aircraft patrols with orders to "shoot down any plane seen in the air that was not known to be one of our own."): Captain McVay's court-martial held him to the same standard for hazarding U.S.S. *Indianapolis* -- not what he might have done had he possessed more information, but what *Indianapolis* did with the information she had. *Infra*, pp. 101-03. Coincidentally, the same situationally sensitive standard is the standard by which the law measures negligence. *Infra*, p. 101 n.477.

system or methodology to compare and “regularize” the ranks of admirals and generals by *officially* “correcting,” up or down, the allegedly undeserved positive or negative impacts of constitutionally sound decisions upon individual reputations. No officer has a right to the equal affection and confidence of the President. The President may prefer different officers over others, for purely subjective reasons.

Advocates for Kimmel and Short have characterized the government’s actions with respect to the commanders as a series of outrages against law—star chamber proceedings, denial of counsel, secret evidence, impoundment of records, suppression of witnesses. All of these emotional arguments are based on claims to rights that did not exist. No legal error can be discerned in the various personnel actions taken in the Pearl Harbor cases. Counsel for the Kimmels has not cited one case or statute that indicates otherwise. The controlling legal principle in these cases is constitutional executive discretion.³⁷⁶

Under the authority conferred upon him by the Constitution, the President may revisit today, tomorrow, or at any time, the judgments made about Kimmel and Short. He may make or decline to make posthumous appointments, notwithstanding the precedents set by his predecessors. Both sides of this debate may appeal to the President’s discretion. Some authors continue to point out grave errors in Kimmel’s or Short’s judgment,³⁷⁷ while others continue to

³⁷⁶See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-167 (1803)(opinion by Chief Justice Marshall)(“By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive . . . [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable . . . The powers of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion.”); 11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789 (Charles Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds. 1992), at 921-27 (Madison: The checks on the President for “wanton removal of meritorious officers” are impeachment and public opinion); CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 2 (1976)(The President’s “powers in the broad field of national defense are largely discretionary. . . . For his conduct of such affairs the President is responsible, so far as he can be held responsible, only to Congress, the electorate, and the pages of history.”).

³⁷⁷E.g., HARRY A. GAILEY, THE WAR IN THE PACIFIC 83-84 (1995)(“Washington authorities believed that sufficient warning had been given to both Kimmel and Short . . . The admiral saw no reason to change the orders that he had issued in October regarding security aboard ships. He further decided against increasing security and readiness measures on the vessels within Pearl Harbor. Nor did Kimmel order any long-range aerial scouting missions. . . . However one wishes to sympathize with Kimmel, it is difficult to comprehend why a seasoned flag officer who had been told that a dispatch was a “war warning” failed to take such basic precautions. One possible explanation is that, confident in his preparations, he ignored the fact that during fleet exercises in 1928 and again in 1932 and 1938, successful air attacks had been launched against Hawaii by American planes acting as aggressors . . . Vice Admiral William F. Halsey Jr., aboard the *Enterprise*, believed hostilities were imminent and put the carrier on war alert. Because of the movement of these carriers [i.e., Lexington and Enterprise to

capitalize on the scapegoat brief first formulated by Republicans seeking to discredit the Roosevelt Administration.³⁷⁸ The archive of material consulted to prepare this paper evidences many *thousands* of hours of work by government officials to respond to decades of reiteration of the same complaints made with respect to Kimmel and Short. The Kimmels have vowed to continue this struggle.³⁷⁹ Although there is no formal principle of *res judicata* in discretionary executive decisions, at some point in history the Executive Branch must have a practical, efficiency-based interest in the finality of administrative decisions which are nonjusticiable, decisions from which there would be no recourse for ordinary people whose rights are subject to the many preclusive legal principles discussed in this paper. The Kimmels seek, through cross-Branch political manipulation, exception from established principles of law, with the Shorts in tow.

The campaign to reverse lawful decisions of a previous President and his deputies challenges fundamental principles of Executive authority. The disregard for such authority evident in the frequently petulant demands of the Kimmels³⁸⁰ sheds light on the unfavorable reception their campaign continues to receive within the Executive Branch. The consequences of officially "correcting" discretionary decisions made by past constitutional authorities would be a creeping encroachment on the exercise of discretion in future cases, by recognizing standards and limits in the exercise of discretion where no standards or limits exist and none were intended to exist. It is one thing for the President to change his mind and show leniency in a case in which he has already acted, and entirely another to attempt to compel a future President to reverse his predecessor on the basis of subjective values argued as superior to the President's constitutional power.

There is no "cover-up." The *Dorn Report* candidly admitted broadly shared fault for the Pearl Harbor disaster. Denial of posthumous promotion for Kimmel and Short can no longer be called "a large concrete sarcophagus which is inscribed with a large rump on the backside saying

Midway and Wake], the southwest approaches to Hawaii were reasonably well covered by planes from the two task forces. However, nothing was done to cover the northwest approaches—which in previous naval air exercises had been considered the most important sectors.").

³⁷⁸E.g., EDWARD L. BEACH, *SCAPEGOATS* (1995) ("The emotional change in national outlook, combined with the shock to our pride, brought about, as Roosevelt understood it might, an almost pathological search for someone to blame for allowing it to happen. He needed scapegoats, if for no other reason than to allow him to carry on the war. Upon Adm. Husband E. Kimmel . . . and Lt. Gen. Walter C. Short . . . therefore landed the weight of national obloquy . . .").

³⁷⁹E.g., Bradley Peniston, *Defending His Life, Son Continues Fight to Clear Father's Name in Pearl Harbor Disaster*, THE CAPITAL, Jan. 4, 1996, at B1 (Retired Navy Captain Thomas Kimmel, one of Rear Admiral Kimmel's sons, reacted with disappointment to the *Dorn Report*. Captain Kimmel blamed the rejection of posthumous advancement for Rear Admiral Kimmel on politics—"[T]he Democrats were worried about tarnishing Roosevelt."—and indicated that the Kimmels would wait for another Republican administration to renew their intergenerational efforts into yet the next generation of Kimmels.); *Thurmond Hearing*, at 72-73 (Manning Kimmel IV)..

³⁸⁰E.g., *Thurmond Hearing*, at 15-16, 66 (Manning Kimmel IV).

this butt [President Roosevelt's] must be protected."³⁸¹ Even admitting for the sake of argument all of the facts alleged by the Kimmels and Shorts and their more rational advocates, nothing done in the Kimmel and Short cases exceeded the President's power. The more important consideration in these cases is not protection of Roosevelt's reputation, but, unapologetically, protection of the established scope of Presidential power itself.

As executive officials have stated repeatedly with respect to these cases, the facts do not warrant posthumous promotion, nor, let it be added, does the law require it.

III. Case Study: U.S.S. *Indianapolis*

Three recent Congressional inquiries concerning Captain Charles B. McVay III have renewed interest in his famous court-martial.

In a letter of September 18, 1995 to Vice Admiral Philip M. Quast (then Commander, Military Sealift Command), Representative Andrew Jacobs, Jr., of Indiana requested that Admiral Quast lend his efforts to the exoneration of Captain McVay.³⁸² On October 17, 1995, Admiral Quast forwarded Congressman Jacobs' letter to the General Counsel of the Navy for response to Congressman Jacobs.

In a letter to the Secretary of Defense, dated February 7, 1996, Representative Timothy Holden of Pennsylvania requested reconsideration of the McVay case, enclosing a copy of a recent letter to the President from constituent Leon Bertolet. The White House forwarded Congressman Holden's request to the Secretary of the Navy for direct response.

On March 13, 1996, Representative Floyd Spence, Chairman of the House Committee on National Security, wrote to Rear Admiral Robert Natter, Chief of Legislative Affairs, Department of the Navy, requesting an investigation of the McVay case and a full report. Chairman Spence's letter also enclosed a copy of Leon Bertolet's letter to the President.

The circumstances surrounding the sinking of *Indianapolis*, the four-day delay in rescuing the surviving crew members from the water, and the court-martial of Captain McVay have been the subject of numerous previous inquiries, several books, many journalistic articles, a television movie, and a legal study completed at the request of Senator Richard Lugar in 1992.³⁸³ The centerpiece of controversy over the fate of *Indianapolis* has become the court-martial of Captain McVay. Critics have impugned the court-martial on numerous legally imprecise grounds,

³⁸¹ *Thurmond Hearing*, at 44 (John Costello).

³⁸² Congressman Jacobs' letter followed a public speech given by Admiral Quast at the dedication of a national memorial to U.S.S. *Indianapolis* in the City of Indianapolis on August 2, 1995, the fiftieth anniversary of the rescue of the surviving crewmen.

³⁸³ The legal study was conducted by C. Don Nattkemper, Robert Morris and J. Lee McNeely of McNeely, Sanders, Stephenson & Thopy, of Shelbyville, Indiana [hereinafter *Lugar Study*].

stimulating widespread popular misconception. Proponents of a theory that Captain McVay was made a "scapegoat" for institutional failures of the Navy and the shortcomings of higher ranking officers have urged that his court-martial be expunged and Captain McVay be exonerated of fault for the tragedy. Accordingly, this paper reviews the facts surrounding Captain McVay's trial, and analyzes in detail the charge under which he was convicted. Even taking the basic facts as the critics generally allege them, the conclusion compelled by applicable law is that Captain McVay's court-martial was sound and remedial action is not warranted.

In addition to legal sources cited, the following sources of information were reviewed in the preparation of this paper: the complete official service record of Captain McVay and all accompanying official personnel files maintained by the National Archives and Records Administration; the original Record of Trial of Captain McVay's general court-martial, and all post-trial review records; the official record of the court of inquiry commenced on August 13, 1945 to inquire into the demise of *Indianapolis*, at the direction of Admiral Nimitz, and all endorsements and subsequent correspondence included with the record, including the two supplemental reports of the Naval Inspector General; Navy Department correspondence concerning the disposition of Captain McVay's case; the report of the legal review commissioned by Senator Lugar; recent press treatment of the sinking of *Indianapolis* and Captain McVay's court-martial; and four books dedicated to the *Indianapolis* tragedy and Captain McVay.³⁸⁴

The Sinking of *Indianapolis* and the Court-Martial of Captain McVay³⁸⁵

On November 18, 1944, Captain Charles B. McVay III assumed command of *Indianapolis*. A kamikaze attack damaged *Indianapolis* at Okinawa in April 1945 while serving as Admiral Spruance's Fifth Fleet flagship. Mare Island Naval Shipyard overhauled her between early May and mid-July 1945, then she put to sea on July 16, 1945, to deliver atomic bomb components to Tinian. Upon completion of this mission on 26 July, CinCPac ordered

³⁸⁴DAN KURZMAN, *FATAL VOYAGE* (1990); RAYMOND B. LECH, *ALL THE DROWNED SAILORS* (1982); RICHARD F. NEWCOMB, *ABANDON SHIP!* (1976); THOMAS HELM, *ORDEAL BY SEA* (1963). Samuel Eliot Morison's account of the loss of *Indianapolis* was also consulted. SAMUEL ELIOT MORISON, *14 HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II, VICTORY IN THE PACIFIC* 319-330 (1960). John Harriss's *SCAPEGOAT! FAMOUS COURTS MARTIAL* (1988) has an unnumbered chapter on Captain McVay, beginning on page 224. Harriss's account is based entirely on Lech and Newcombe and is narrowly focused on the "scapegoat" thesis without in-depth analysis. Harris presents a collection of the clichés of the conspiracy theorists: he discounts the information on submarine contacts that was available to *Indianapolis*; he assumes that discretion to zigzag in the sailing instructions freed McVay of responsibility for prudent decisions on evasive maneuvering; he attributes too much significance to ULTRA information (supposing, incorrectly, like other authors, that ULTRA showed exactly where the Japanese submarines were located); and he also sensationalizes the fact that a Japanese commander testified at Captain McVay's court-martial. This paper addresses each of these issues.

³⁸⁵Official accounts of the events surrounding the sinking of *Indianapolis* are readily available to the public in two Naval Inspector General's reports of January 7, 1946 (to CNO), *reprinted in* LECH, at 231-253 (1982). There is no substitute, however, for careful reading of the sworn testimony in the record of the Court of Inquiry and the Record of Trial.

Indianapolis to proceed to Guam (CinCPac's forward headquarters) for further routing to Leyte, Philippines. Upon arrival at Leyte, CinCPac's orders stated that *Indianapolis* should report by dispatch to CTF 95 (then at Okinawa) for duty, but that CTG 95.7 should arrange ten days of training for *Indianapolis* in the Leyte area. The CinCPac orders did not specify departure and arrival dates. CTF 95 and CTG 95.7 were information addressees of these orders, but CTG 95.7's copy was garbled in reception or decoding and his communications staff did not request a retransmission. Accordingly, CTG 95.7 was not aware that *Indianapolis* had been directed to report to him for refresher training.

After *Indianapolis* arrived at Guam on 27 July, the CinCPac Assistant Chief of Staff for Operations, Commodore Carter, referred Captain McVay to the Port Director for routing instructions and an intelligence briefing. In the Port Director's office, Captain McVay and the routing officer assigned to work with him settled on a 15.7 knot speed of advance³⁸⁶ along the standard transit route between Guam and Leyte.³⁸⁷ The routing instructions specified departure from Guam at 0900 on Saturday, 28 July, with expected arrival at 1100 on Tuesday, 31 July, a three-day transit. Captain McVay inquired about the availability of an escort and the routing officer informed him that none was required.³⁸⁸ *Indianapolis* had traveled unescorted before,³⁸⁹

³⁸⁶Captain McVay chose this speed when offered a two-day transit at 24-25 knots, or a three-day transit at approximately 16 knots. Record of Trial, at 350 (testimony of Captain McVay). A fuel conservation limit on transit speeds in effect in the Pacific theater apparently did not affect the choice of transit speeds. The speed chosen accommodated Captain McVay's desire to arrive off the entrance to Leyte Gulf at daylight in order to conduct anti-aircraft practice prior to entering the Gulf. A higher speed would have made submarine targeting of *Indianapolis* more difficult.

³⁸⁷The *Wartime Pacific Routing Instructions* in effect at the time specified standardized routes between combat operations areas. Accordingly, the Port Director's office assigned *Indianapolis* route "Peddie," the standard route between Guam and Leyte. Changes in the standard routes had been recommended, but the Navy Department had not acted on the recommendation before *Indianapolis* sailed.

³⁸⁸The issue of an escort has been the subject of considerable controversy. As an older cruiser (launched in 1931), *Indianapolis* was not outfitted with submarine detection equipment. In his endorsement of the Court of Inquiry's report, Fleet Admiral King (Chief of Naval Operations) recommended that the Secretary of the Navy (Forrestal) direct additional investigation into the reasons for routing *Indianapolis* without an escort. Further consideration of the question revealed that a requirement for escort by anti-submarine capable ships was in place in an area well to the north of Guam. Allied forces had pushed the sphere of Japanese control back across the Pacific to the immediate vicinity of Japan; the area along the route from Guam to Leyte was considered a rear area at this point in the war. Requirements closer to Japan had stretched escort assets thin. Although escorts were not required for warships transiting route "Peddie," one could have been provided if available. However, Captain McVay and the routing officer did not discuss the availability of an escort further after the Operations Office for COMMARIANAS affirmed the policy that an escort was not required. LECH, at 19-20, 234-5; NEWCOMB, at 49-50.

³⁸⁹For example, *Indianapolis* had transited unescorted from San Francisco to Tinian (near Guam) while transporting critical atomic bomb components. See LECH, at 20; Record of Trial, at 350 (testimony of Captain McVay)("I didn't give it another thought, because I had traveled many times without an escort."). Proponents of Captain McVay, however, have perpetuated the false assertion that "McVay was . . . ordered to sail unescorted, the first time during the war that a large ship did so." See, e.g., Burl Burlingame, *Historian: McVay Didn't Have Spy Data*, HON. STAR BULL., Nov. 4, 1993, at A6.

and Captain McVay gave no further consideration to the issue of an escort. A standard clause in the routing instructions left zigzagging to the discretion of the commanding officer.³⁹⁰

After *Indianapolis* departed Guam on 28 July, the Port Director transmitted her departure time, speed, route, estimated time of arrival at Leyte, and expected mid-transit "chop"³⁹¹ date from COMMARIANAS to Commander, Philippine Sea Frontier (30 July).³⁹² CTF 95, who had received CinCPac's tasking orders for *Indianapolis*, did not receive from the communications center on Okinawa the Guam Port Director's departure message with specific dates and times. CTG 95.7 did receive the Port Director's departure message, but its significance to him was not clear because he was unaware of the previous (garbled) CinCPac orders that had tasked him to provide ten days of training for *Indianapolis*.³⁹³ Because of these communications lapses, neither commander possessed sufficient information to cause him to monitor the arrival of *Indianapolis* at Leyte on 31 July. COMMARIANAS, Commander, Philippine Sea Frontier, and the Port Director at Leyte received the Guam Port Director's message.

All sources agree that no one provided Captain McVay information on enemy submarine activity derived from codebreaking of Japanese communications under the "ULTRA" signals intelligence (SIGINT) program.³⁹⁴ ULTRA information concerning the activities of Japanese submarines in the Western Pacific in July was available to key officials on the staffs of CNO (then also serving as Commander in Chief, U.S. Fleet), CinCPac, and COMMARIANAS.³⁹⁵ The

³⁹⁰"Commanding Officers are at all times responsible for the safe navigation of their ships Zigzag at discretion of the Commanding Officer." LECH, at 211. The routing instructions are Exhibit 1 in the Record of Trial.

³⁹¹"CHOP" signifies "Change of Operational Control" from one regional commander to another.

³⁹²COMMARIANAS and Commander, Philippine Sea Frontier, were regional sea commanders, responsible for naval activities in their geographic areas. The CinCPac Port Director transmitted the routing message for action to the Shipping Control Officer, Marianas Area; the Port Director at Tacloban, Leyte, Philippines; and CTG 95.7. Information addressees included COMFIFTHFLT; COMMARIANAS; CTF 95; Commander, Philippine Sea Frontier; and CinCPac. See LECH, at 53, 215; Court of Inquiry, Exhibits 2, 19.

³⁹³LECH, at 26-27, 240-41 (Naval IG's report to CNO).

³⁹⁴Signals intelligence information within the ULTRA program was highly classified and tightly controlled. The Japanese would have changed their code had they suspected that the Allies had broken it, depriving the United States of a bounty of information critical to prosecution of the war.

³⁹⁵LECH, at 13-16, 23-24, 233 (Naval IG's report); KURZMAN, at 44-47. See also Richard A. von Doenhoff, *ULTRA and the Sinking of US Indianapolis*, 11th Naval History Symposium (Oct. 1993) (Among sources consulted, von Doenhoff stands alone in doubting that COMMARIANAS would have been provided copies of ULTRA intelligence reports.). Exactly how much information was available in ULTRA channels on the four Japanese submarines has never been conclusively established, but this has not deterred proponents of McVay from suggesting that dissemination of ULTRA information would have changed the course of history. Declassified reports that have been identified include a Joint Intelligence Committee, Pacific Ocean Area (JICPOA) Report A-1 dated July 16, 1945, which indicated that submarines I-58 (the submarine that sank *Indianapolis*) and I-367 were scheduled to depart the Empire on July 19 for patrol in the Marianas-Carolines area, a vast ocean area generally East of *Indianapolis*'s track to Leyte. A Seventh Fleet Intelligence Center weekly report of July 21 warned that I-

apparent policy at CinCPac was that pertinent ULTRA information should be provided with routing instructions in a generalized and sanitized form so that its source could not be identified.³⁹⁶ The Port Director at Guam relied on the Surface Operations Officer on the COMMARIANAS staff to provide intelligence for inclusion with ship routing instructions.³⁹⁷ Captain Oliver Naquin, the Surface Operations Officer, did not provide the Port Director the ULTRA information on submarine threats he held in July.³⁹⁸ The 16 July ULTRA report for the Pacific theater included the Japanese submarine that attacked *Indianapolis* days later, I-58.³⁹⁹

The intelligence briefing for *Indianapolis*'s transit provided by the Port Director at Guam also omitted the sinking of a destroyer escort, U.S.S. *Underhill*, by a sub-launched suicide torpedo (a "*kaiten*"⁴⁰⁰) on July 24 near Okinawa.⁴⁰¹ Why the sinking of *Underhill* was omitted is

58 and I-367 were patrolling in the central Pacific area, and daily CinCPac bulletins warned of I-367 (with no mention of I-58) on three occasions prior to July 27. See VAN DOENHOFF, at 8-9, nn.7, 8, and enclosure (1)(citing NSA records held by the National Archives and Records Administration).

³⁹⁶LECH, at 23.

³⁹⁷LECH, at 24. The Surface Operations Officer at COMMARIANAS received ULTRA information from a pipeline through CinCPac. KURZMAN, at 44-45.

³⁹⁸The Naval Inspector General's reports to CNO attributed to Captain Naquin responsibility for the fact that *Indianapolis* did not receive ULTRA-derived information. See LECH, at 233, 247 (texts of the two IG reports of January 7, 1946).

³⁹⁹A great deal of finger-pointing has been indulged over the failure to provide ULTRA information to Captain McVay. For example, writers have pointed out that Commodore Carter, the CinCPac Assistant Chief of Staff for Operations, failed to provide ULTRA information to Captain McVay when he directed him to the Port Director's office for routing instructions and an intelligence briefing (duties normally handled by routing officers in the Port Director's office). E.g., LECH, at 15-16; KURZMAN, at 44-45. Kimo McVay, one of Captain McVay's sons, protested that "[b]efore taking over the *Indianapolis*, dad was the chairman of the joint intelligence committee of the combined chiefs of staff in Washington, the Allies' highest intelligence unit. And he was entrusted with the secrets of the atomic bomb. But they didn't want to give him a heads-up that Japanese submarines were in his path." Burl Burlingame, *Historian: McVay Didn't Have Spy Data*, HON. STAR BULL., Nov. 4, 1993, at A6 (quoting Kimo McVay). While assigned to such duties from 1943 to 1944, Captain McVay would have had access to a great deal of highly classified information, but access to such information was and still is a consequence of the particular billet in which an officer is serving at the time. Failure to receive classified information is not justiciable. No one has an enforceable right to a security clearance or particular classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 528-29 (1988) ("It should be obvious that no one has a 'right' to a security clearance For 'reasons . . . too obvious to call for enlarged discussion,' the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." (citation omitted)). The legal significance of the ULTRA intelligence to Captain McVay's court-martial is discussed *infra*, at pp. 100 n.471, 102-03 n.478.

⁴⁰⁰*Kaiten* torpedoes were manned mini-submarine torpedoes equipped with a periscope and capable of independent piloting toward a selected target. Once launched, *kaitens* were unrecoverable. Up to six *kaitens* could be carried on the deck of an appropriately modified attack submarine.

⁴⁰¹LECH, at 12, 22-23; KURZMAN, at 43, 45-47; MORISON, at 317-19. See generally NEWCOMB, at 10. *Underhill* was broken in half when she attempted to ram a periscope, which turned out to be a *kaiten* and not a Japanese submarine.

not clear.⁴⁰² The 16 July ULTRA report for the Pacific indicated that I-53, the submarine that sank *Underhill*, had departed the Empire on July 14 for patrol in the Okinawa area, far to the North of *Indianapolis*'s track.⁴⁰³

The intelligence enclosure provided with *Indianapolis*'s routing instructions did contain three reports of "enemy submarine contacts:" on July 22 a submarine had been sighted surfaced 72 miles south of *Indianapolis*'s projected track and a hunter-killer group had been ordered to respond; on July 25 a "possible periscope" had been sighted 95 miles north of the projected track; and again on July 25 a sound contact characterized as a "doubtful submarine" had been detected 105 miles south of *Indianapolis*'s track.⁴⁰⁴ The government presented testimony at Captain McVay's trial that these three contact reports placed possible enemy submarines within striking distance of *Indianapolis*, given the course and speed specified in the routing instructions.⁴⁰⁵ *Indianapolis* received additional information on submarine threats along her track after she departed Guam on July 28. On Saturday, 28 July, a merchant vessel hauling Army cargo to Manila, the *Wild Hunter*, reported sighting a periscope 75 miles south of the position *Indianapolis* would pass on its track on Monday, 30 July. In a second message, *Wild Hunter* reported sighting the periscope again and firing on it. A U.S. hunter-killer group was dispatched and reported contact approximately 200 miles south of *Indianapolis*'s position. *Indianapolis* received a series of messages from *Wild Hunter* and the U.S.S. *Albert T. Harris* (DE 447) hunter-killer group on 29 July,⁴⁰⁶ leading Commander Janney, *Indianapolis*'s Navigator, to comment that evening in the wardroom that *Indianapolis* would pass a Japanese submarine during the night.⁴⁰⁷ Information on the *Harris* datum was available on the bridge, and the Officer of the Deck was aware of it.⁴⁰⁸ During the night of 29 July, the radio room on *Indianapolis* reportedly received another message that two torpedoes had missed a merchant ship about 300 miles to the south.⁴⁰⁹

⁴⁰²Shortly after the *Underhill* sinking, Lech states that "Naval Intelligence at Pearl Harbor broadcast an emergency message to all commands in the Pacific" advising them not to ram suspected submarine contacts. Whether *Indianapolis* received this message with more detailed information about the sinking of *Underhill* is not known. LECH, at 13.

⁴⁰³*Underhill* sank at 19-20.5N, 126-42E, and *Indianapolis* at 12-02N, 134-48E, a distance of over 730 miles. See MORISON, at 318, 324.

⁴⁰⁴Record of Trial, at 20-21, Exhibit 1(2); NEWCOMB, at 50-51. Captain McVay's testimony at trial indicated that these three submarine contacts were already known aboard *Indianapolis* from radio traffic. Record of Trial, at 350.

⁴⁰⁵Record of Trial, at 20-24 (LCDR Alan R. McFarland, USN, who had served in various destroyers and was Commanding Officer of U.S.S. *Beche* (DD 470) at Iwo Jima and Okinawa).

⁴⁰⁶Record of Trial, Exhibit 15; NEWCOMB, at 55-56, 58; LECH, at 34; KURZMAN, at 52-54.

⁴⁰⁷Record of Trial, at 68, 73; NEWCOMB, at 56; KURZMAN, at 52-53. When he dropped the night orders off on the bridge later that evening, Commander Janney commented that *Indianapolis* would pass through the area where *Harris* was prosecuting a submarine contact the next morning. Record of Trial, at 48, 56; LECH, at 34; NEWCOMB, at 58. Janney had apparently also listened to radio communications between ships in the *Harris* hunter-killer group as they coordinated their operations. KURZMAN, at 57.

Indianapolis was a very "tender" ship, meaning that she was particularly susceptible to capsizing or sinking from flooding. Like many warships launched before the age of radar, so much equipment had been added topside that Admiral Spruance once determined her metacentric height to be less than one foot, remarking that if she ever took a clean torpedo hit she would capsize and sink in short order.⁴¹⁰ Captain McVay testified to this effect at the Court of Inquiry held after the sinking of *Indianapolis*:

Q. Is the INDIANAPOLIS class of cruisers reported as being a soft ship?

A. . . . [T]hey are so tender there are strict orders not to add any weight that cannot be fully compensated for. I have heard high ranking officers state as their opinion that they feel certain this class of ship could hardly be expected to take more than one torpedo hit and remain afloat.⁴¹¹

In addition to her inherent stability-based vulnerability, the crew operated *Indianapolis* when cruising in "material condition YOKE modified," meaning that all of the watertight doors on the second deck were left open to provide ventilation to improve habitability.⁴¹² Leaving these watertight fittings open made the ship particularly susceptible to loss by flooding.⁴¹³ Captain McVay's night orders specified that *Indianapolis* was steaming in "YOKE modified" when he retired on 29 July.⁴¹⁴ Captain McVay was fully aware of the special vulnerability of his ship to torpedo attack.⁴¹⁵

⁴⁰⁸Record of Trial, at 34-35, 37 (testimony of LTJG McKissick), 48, 56 (testimony of LCDR Redmayne); KURZMAN, at 53-54, 56-57 (McVay visited the bridge one last time before retiring and did not inspect the message file there that contained the *Wild Hunter* message traffic).

⁴⁰⁹Record of Trial, at 96, 99 (testimony of RM1 Moran)(a "high precedence message" received at 2100); KURZMAN, at 53.

⁴¹⁰MORISON, at 319; KURZMAN, at 15; HELM, at 10-11.

⁴¹¹Court of Inquiry, at 7.

⁴¹²KURZMAN, at 59; Record of Trial, at 285, 352, 362; Court of Inquiry, at 2 (McVay). The three "material conditions," XRAY, YOKE and ZEBRA (or ZED), refer to increasing degrees of watertight integrity aboard surface vessels. ZEBRA is the most secure condition, when all watertight enclosures are secured for battle. YOKE is the normal cruising condition. "YOKE modified" was an informally recognized condition less secure than YOKE.

⁴¹³Record of Trial, at 283-86 (testimony by an officer formerly in charge of the stability section at BUSHIPS)("It was obvious . . . that the water was free to flow down the second deck into the engineering spaces, so that the ship, for all practical purposes, was wide open."), 362 (McVay).

⁴¹⁴Court of Inquiry, at 3; Record of Trial, at 362.

⁴¹⁵BUSHIPS was also aware of the use of condition "YOKE modified" on many older ships and tacitly approved it. The point is not that Captain McVay was responsible for placing his ship in a dangerous, unauthorized condition with respect to watertight integrity. The Navy has never faulted Captain McVay for cruising in "YOKE modified."

On the evening of 29 July, at a time when visibility was poor, Captain McVay told the Officer of the Deck that he could secure zigzagging after twilight.⁴¹⁶ The ship ceased zigzagging at approximately 2000.⁴¹⁷ Visibility improved later that night after moonrise,⁴¹⁸ characterized by Captain McVay as follows: "There was intermittent moonlight at which times the visibility was unlimited."⁴¹⁹ The record of Captain McVay's court-martial contains *extensive* testimony by various *Indianapolis* crew members of improved visibility around the time of I-58's attack at midnight.⁴²⁰ The significance of the degree of visibility is apparent from the following standing Naval instructions in effect at the time:

I. War Instructions, Fleet Tactical Publication (FTP) 143(A).⁴²¹

Paragraph 702: When cruising, the officer in tactical command normally orders his command to zigzag . . . whenever there is a probability of encountering enemy submarines.

The point is that Captain McVay knew that his ship was particularly vulnerable to flooding, a fact that should have counseled even greater circumspection with respect to the threat of torpedo attack. The Captain also knew that Portland-class cruisers, like *Indianapolis*, were not equipped with acoustic submarine detection equipment.

⁴¹⁶Record of Trial, at 31, 37-38, 186-87, 360 (McVay: "I told the officer-of-the-deck . . . that he could cease zigzagging at dark . . ."). See KURZMAN, at 55-56; HELM, at 25, 45. Captain McVay did not recall specific orders on zigzagging in the night orders prepared by Commander Janney, but the Quartermaster of the Watch, Allard, did. Record of Trial, at 186-87.

⁴¹⁷Record of Trial, at 139, 183, 186, 192, 359 (McVay), 371, and Exhibit 6(1)(Captain McVay's report to SECNAV on the loss of *Indianapolis*, August 12, 1945: "We had ceased zigzagging at 2000.").

⁴¹⁸KURZMAN, at 57-58; NEWCOMB, at 59.

⁴¹⁹Record of Trial, Exhibit 6(1). Captain McVay thus described the visibility in a report to SECNAV prepared shortly after his rescue. He amended other parts of the report numerous times before submitting it, but he did not amend his statement on the visibility. Record of Trial, at 357. As he stated at his court-martial (when the *legal* significance of visibility had become clear), "At the time I made out that official report . . . the question of visibility did not appear to me to be one of importance." Record of Trial, at 356. The conditions under which Captain McVay made his official report do not impugn but lend *veracity* to his description of the visibility. NAVAL COURTS AND BOARDS 142-433, ¶ 189 (1937)(*Res gestae* have "an element of truthfulness" because they are spontaneous, and near enough in time to the principal transaction "to preclude the idea of deliberate design or afterthought in making them." Strict contemporaneity is not required; some admissible *res gestae* occur days later. Each instance depends on circumstances.). See BLACK'S LAW DICTIONARY 1173 (5th ed. 1979)("Res gestae")("A spontaneous declaration made by a person immediately after an event and before the mind has an opportunity to conjure a falsehood."). Scholars of evidence have long recognized "spontaneity as the source of special trustworthiness." See, e.g., MCCORMICK ON EVIDENCE § 288 (Edward W. Cleary et al., eds. 1984), at 836.

⁴²⁰See Record of Trial, at 370 (the Judge Advocate's closing argument, cataloging specific references in testimony to good visibility). The previous court of inquiry had also found that visibility had been good. Court of Inquiry, Opinion 2. See LECH, at 172.

⁴²¹Record of Trial, Exhibit 3.

Paragraph 703: Generally speaking, all vessels . . . zigzag in submarine waters.

Paragraph 704: During thick weather and at night, except on very clear nights or during bright moonlight, vessels normally cease zigzagging.

Paragraph 707: Single ships of any speed zigzag in dangerous submarine waters.

II. U.S. Fleet 10B:⁴²²

Paragraph 3410: Ships . . . shall zigzag during good visibility, including bright moonlight, in areas where enemy submarines may be encountered Zigzagging should normally cease after evening twilight and commence prior to morning twilight, unless the phase of the moon requires that zigzagging be continued.

III. Wartime Pacific Routing Instructions:⁴²³

Paragraph 342: Unescorted ships of speeds of 10 knots or more shall zigzag day and night except in heavy weather or low visibility while in open waters

Shortly before midnight, submarine I-58 surfaced and spotted *Indianapolis* against the horizon.⁴²⁴ I-58 dove and maneuvered into attack position, launching a fan of six torpedoes, at least two of which struck *Indianapolis* shortly after midnight. With the fire, smoke, flooding and loss of critical systems aboard the ship, the crew responded valiantly. The Captain attempted to ascertain the degree of damage before deciding whether to abandon ship. When it was clear that the ship could not be saved, the word to abandon ship had to be passed orally due to the loss of internal communications systems. *Indianapolis* did not transmit successfully a distress message, despite two reported attempts; a wave swept the Captain into the Ocean before he could verify this important detail.⁴²⁵ The Pacific Ocean swallowed *Indianapolis* in less than fifteen minutes after the first blast. Of nearly 1200 men, approximately 400 went down with the ship, and 800

⁴²²Record of Trial, Exhibit 4 (acknowledged by Captain McVay at 359, 362).

⁴²³Record of Trial, Exhibit 5. See Court of Inquiry, at 10 (*Indianapolis* was sailing within the area to which this instruction applied).

⁴²⁴*Indianapolis* did not detect I-58 by radar.

⁴²⁵The Navy has never challenged Captain McVay's uncorroborated account that he did not go down with his ship because he was swept over the side by a wave, notwithstanding apparent conflicts in his testimony. See Record of Trial, at 351 (" . . . I abandoned ship."), 355 ("I was sucked off . . . the ship by a wave."); Court of Inquiry, at 5 (" . . . I was washed off by a wave").

managed to escape into the water. Over the next four days, adrift on the ocean, 480 of the survivors of the submarine attack were preyed upon by sharks or succumbed to their wounds or the elements. Only 320 survived to be rescued.⁴²⁶

Many factors contributed to delay in the rescue of the *Indianapolis* survivors. *Indianapolis* did not successfully transmit a distress message.⁴²⁷ No one took action on a Japanese kill report.⁴²⁸ Personnel in the Port Director's office in Leyte did not expect the ship to arrive until 31 July, and did not report her non-arrival on 31 July, due in part to the heavy volume of ship traffic. CTF 95 and CTG 95.7 were missing message traffic that might have caused them to inquire into the failure of *Indianapolis* to report at Leyte on 31 July.⁴²⁹ Vessel routing procedures in CINCPAC 10-CL-45 and COMSEVENTHFLT 2-CL-45 stated that "arrival reports shall not be made for combatant ships,"⁴³⁰ which the Port Director at Leyte construed as implying that *non-arrivals* of combatant ships should also not be reported.⁴³¹ Personnel in the Port Director's office were responsible primarily for merchant vessels and were accustomed to

⁴²⁶LECH, at 156.

⁴²⁷Court of Inquiry, Finding of Fact 13 (negative check of all stations that might have received a distress signal). In his report forwarding the record of the 13 August Court of Inquiry, Admiral Nimitz attributed blame to Captain McVay for *Indianapolis*'s failure to send a distress message immediately after the explosions. *See also* Court of Inquiry, Opinion 42(b). In his first endorsement, Admiral King found that "Measures had not been taken in advance to provide for the sending of a distress signal in an emergency." King added:

The failure of Commanding Officer of the INDIANAPOLIS to have anticipated an emergency which would require the sending of a distress message on extremely short notice and his failure to have a procedure for despatching such a message established on board ship, undoubtedly contributed to the apparent fact that no message was sent. The responsibility for this deficiency must rest with Captain McVay. It is possible that mechanical failure might have precluded the sending of a distress message even if one had been immediately available in proper form, but the record indicates no such message was ready and that this emergency had not been anticipated.

In the Eighth Endorsement on the report of the Court of Inquiry, the Chief of the Bureau of Ships stated that evaluation of the evidence indicated that electrical power was available to the radio transmitters on *Indianapolis* for an appreciable time before she sank. The convening authorities never charged Captain McVay with an offense based on this finding.

⁴²⁸CinCPac intercepted a report from I-58 that it had sunk a battleship, but the grid system used by the Japanese to indicate location had not been deciphered. The Pacific command intercepted many Japanese reports bragging of spurious ship sinkings. CinCPac did not provide a copy of I-58's message to COMMARIANAS, the commander responsible for the sea area where *Indianapolis* had been sunk. No one gave further attention to I-58's report when a confirming SOS was not received. KURZMAN, at 94-95.

⁴²⁹*See* LECH, at 249 (IG's report of 7 Jan 46).

⁴³⁰CinCPac intended this provision to reduce message traffic and provide greater security for the movement of combat vessels. Court of Inquiry, Opinion 23.

⁴³¹Admiral King placed blame for the ambiguity in these instructions on Admiral Nimitz. Nimitz later accepted blame for this deficiency publicly. *See also* IG's report, LECH, at 252.

irregularities in the schedules of combatant ships due to unannounced diversions ordered by the operational chain of command.⁴³² No procedures existed for reporting overdue combatant vessels. Personnel of COMMARIANAS and Commander, Philippine Sea Frontier, simply assumed that *Indianapolis* had crossed the "chop" line on July 30 and had arrived in Leyte and took no further action.⁴³³ COMMARIANAS could have but did not reroute *Indianapolis* after receiving the *Wild Hunter* series of reports. The rescue of *Indianapolis* survivors finally commenced on August 2 after an overflying aircraft spotted men in the water. Upon being rescued by U.S.S. *Ringness*, Captain McVay insisted that *Ringness's* message report to CinCPac include the fact that *Indianapolis* was "not zigzagging," notwithstanding the thoughtful objections of the Commanding Officer of *Ringness*.⁴³⁴

On August 9 Admiral Nimitz ordered a Court of Inquiry into the sinking of *Indianapolis* and delay in reporting her loss.⁴³⁵ The Court designated Captain McVay an "interested party"⁴³⁶ and two legal counsel of Captain McVay's choice represented him throughout the proceedings. The Court of Inquiry met from 13 through 20 August. In its final report, the Court placed blame on Captain McVay for failure to zigzag⁴³⁷ and to transmit a distress message,⁴³⁸ recommending that charges against Captain McVay be referred to a general court-martial. Admiral Nimitz disagreed with this recommendation and issued a letter of reprimand to the skipper of his former flagship instead. Upon reviewing the record of the Court of Inquiry, the Chief of Naval Operations, Fleet Admiral King, disagreed with Admiral Nimitz and recommended that Captain McVay be court-martialled.⁴³⁹ King's endorsement pointed to evidence of deficiencies in Captain

⁴³² Admiral King placed blame for complacency and lack of initiative on personnel in the Leyte Port Director's office. Admiral Nimitz issued a letter of reprimand and a letter of admonition to two junior officers responsible for ship arrivals at Leyte. The Secretary of the Navy later withdrew these letters. The IG's report of January 7, 1946 identified the "faulty general practice of ordering combatant units to one destination and then diverting them to another without giving information of the change to all interested commands" as a contributing factor in the failure to report *Indianapolis's* non-arrival. LECH, at 249 (text of IG's report).

⁴³³ The Secretary of the Navy issued letters of reprimand to Commodore Gillette and Captain Granum of the Philippine Sea Frontier, but later withdrew these letters. The procedures in place did not provide for arrival reports for combatant vessels, thus COMMARIANAS and Commander, Philippine Sea Frontier, routinely assumed that combatants had arrived at their destination on time absent contrary information.

⁴³⁴ KURZMAN, at 181.

⁴³⁵ The President of the three-member Court was Vice Admiral Lockwood, COMSUBPAC. The other members were Vice Admiral Murray, COMMARIANAS, and Rear Admiral Francis Whiting.

⁴³⁶ Court of Inquiry, at 2. The rights of an "interested party" at a court of inquiry included: to be present, to examine witnesses, to introduce new matter, to be represented by counsel, to testify (or not to testify) at the party's option. NAVAL COURTS AND BOARDS 357, ¶ 734 (1937). The record of the Court of Inquiry reflects that Captain McVay was allowed to exercise freely all of these rights.

⁴³⁷ Court of Inquiry, Opinions 3 ("That in view of all the attendant circumstances including Fleet doctrine, sound operational practice required INDIANAPOLIS to zigzag on the night in question.") and 42(a).

⁴³⁸ Court of Inquiry, Opinions 40, 42(b).

McVay's performance more than sufficient to establish reasonable grounds to believe that offenses had been committed under applicable military law.⁴⁴⁰ But King was not satisfied with the thoroughness of the Court of Inquiry on numerous other grounds.⁴⁴¹ The Secretary directed the Naval Inspector General to conduct additional investigation. After consideration of delaying a court-martial until the IG's supplementary investigation could be completed, Admiral King recommended that Secretary Forrestal refer charges to a court-martial immediately. The Judge Advocate General proposed that Captain McVay be charged with negligently suffering a vessel to be hazarded (failure to zigzag) and culpable inefficiency in the performance of duty (delay in ordering abandon ship).⁴⁴² After a well-documented deliberative process, Secretary Forrestal referred these charges on November 29, 1945.⁴⁴³

⁴³⁹When invited to comment on the Court of Inquiry and endorsements before the disposition of charges had been determined, Captain McVay declined to do so in a letter to the Chief of Naval Personnel, dated November 7, 1945. This letter is included with the official record of the Court of Inquiry. Proponents of Captain McVay have criticized Vice Admiral Murray's participation in the investigation, since *Indianapolis* sank within COMMARIANAS's area of responsibility. Neither Captain McVay nor his counsel challenged the composition of the Court of Inquiry, during the inquiry or afterwards. Neither McVay nor his counsel challenged the court's findings. No legal irregularity appears in the record of the Court of Inquiry. Courts of inquiry are investigative tools and were not legally related to courts-martial under the *Articles for the Government of the Navy*. No defect in the court of inquiry would have invalidated a subsequent court-martial. *Humphrey v. Smith*, 336 U.S. 695, 698 (1949). Even today, when such formal investigations are required before charges may be referred to a general court-martial, defects in a pretrial investigation are not jurisdictional and are waived if not raised by the accused before trial. 10 U.S.C.S. § 832(d) (1997)(UCMJ art. 32(d)); Rule for Courts-Martial (RCM) 405(k), *MANUAL FOR COURTS-MARTIAL* (MCM) 1995. Compare *Humphrey v. Smith*, 336 U.S. 695, 700 (1949)(Failure to conduct the pre-trial investigation required by Article 70 of the *Articles of War* does not affect jurisdiction of general court-martial or subject it to reversal).

⁴⁴⁰On January 22, 1946, the Judge Advocate General reviewed the record of the Court of Inquiry and determined that the proceedings, findings, opinions and recommendations of the Court, and the actions of the convening and reviewing authorities, were legal. JAG:I:JHK:nrc (SC)A17-24/CA35 Doc. No. 190398 (3d Endorsement).

⁴⁴¹*E.g.*, why route "Peddie" was chosen, why no escort was assigned, why CTG 95.7 did not receive CinCPac's tasking message, and whether survival equipment should be designed more effectively. Kurzman suggests that King wanted to buttress the Navy's case against McVay by additional investigation. KURZMAN, at 215. An honest reading of King's endorsement, however, reveals that King had already decided that sufficient evidence existed to support charges against Captain McVay; King urged additional investigation into other matters.

⁴⁴²The Judge Advocate General reviewed the record of the Court of Inquiry and the supplemental investigation conducted by the IG, and he met with the IG, to consider what charges the evidence might support. He determined that the charges forwarded to the Secretary of the Navy were "the only ones that can be supported." JAG:bee memo for SECNAV of 29 Nov 45.

⁴⁴³KURZMAN, at 189-191, 214-216, 249-253, is replete with melodramatic conjecture on the motivations of Fleet Admiral King and Secretary Forrestal and the interpersonal dynamics between King, Denfield (CHNAVPERs), Colclough (JAG), Snyder (IG) and Secretary Forrestal with respect to the decision to court-martial McVay. See also LECH, at 174-201. For example, Kurzman suggests that Forrestal "had to avoid a scandal that might threaten his chances to keep the Navy independent" (215), that he was reluctant "to defy Admiral King" (216) or "to lock horns" with him (253), describing the Secretary's actions with respect to the court-martial as taken "reluctantly" (216), "anxiously" (248), as he "clung" to the thread of a rationale (249), and "grappled with . . . doubts" (250) with a "troubled conscience" (249), "deeply disturbed" (248). But after all, some "lower-grade officer" had to be punished to protect the Navy and the admirals (253). The independent judgment of Kurzman's quaking Secretary Forrestal is easily overborne by that "handsome" (190), "arrogant" (254), creature of "vanity" (190), Admiral King.

Captain McVay's court-martial was conducted at the Washington Navy Yard from December 3-19, 1945 and was open to the public.⁴⁴⁴ McVay selected his own counsel,⁴⁴⁵ Captain John Cady, joined by two assistant defense counsel.⁴⁴⁶ The seven-member court was regularly composed in accordance with the *Articles for the Government of the Navy*, consisting of Rear Admiral Wilder Baker (President), two commodores and four captains, all with considerable combat experience. On December 3 the defense requested that trial be delayed until the next day, then reported it was ready to proceed on 4 December. The prosecution opened, called 39 witnesses and introduced fifteen exhibits. Among the witnesses the prosecution called was Commander Mochitsura Hashimoto, the Commanding Officer of submarine I-58. After defense objections to Hashimoto's legal competence to testify,⁴⁴⁷ the court concurred with the judge advocate that there was no basis in law to preclude testimony by Hashimoto.⁴⁴⁸ Hashimoto's

King could "never forget" that he had been "stained" once in his youth by a reprimand from McVay's father (Admiral McVay II), and now again "he was being haunted" by a McVay of the same name—"the admiral's son!" (191). "Something had to be done" (191). King, believing that McVay "would understand the necessity of sacrifice" (215), decided to "demolish" (215) him, first urging additional investigation to add more "flesh to the bones" of the case (215), then, worried that more investigation might exonerate McVay and "troublemakers might demand that someone else be punished" (216), he urged that the court-martial proceed immediately (216). After all, "King wanted scapegoats" (253) and the "rotten system" (254) (the "system" that led the fight against the Japanese back across the Pacific) "had to depend on scapegoats to protect arrogant admirals like himself" (254). Secretary Forrestal, who "had been trying to appear tough since childhood," trying "to assert his manhood" (189), "powerless and dependent on others" (190), was unable to resist the wicked counsel of his ambitious partner. After all, Forrestal "feared there would be screams for blood, perhaps even his own." (190) Thus, the tortured pen of Kurzman's Forrestal was driven across the bottom of the charge sheet that sent Captain McVay, the "Toy of Treachery" (261), to a general court-martial. Lech is substantially more temperate in his description of the Navy Department's staffing of issues associated with the McVay court-martial, but he also imagines sinister motives from strikingly dispassionate documents. *See, e.g.,* LECH at 180.

⁴⁴⁴Proponents of McVay purport to find something sinister and prejudicial in the fact that his court-martial was open to the public (*e.g.*, KURZMAN at 252), notwithstanding the fact that section 368 of NAVAL COURTS AND BOARDS (1937), at 205, required that courts-martial sessions be conducted publicly, and the Sixth Amendment of the U.S. Constitution guarantees an accused the right to a "speedy and public trial." The Navy declassified numerous documents to ensure that Captain McVay's court-martial could be conducted publicly. *See* Judge Advocate ltr TJR:lja 00-McVay, C.B./A17-20, of 28 Nov 45 (CAPT Ryan to SECNAV). Under current Rule for Courts-Martial 806, public trials are still the norm. RCM 806, and Appendix 21, Rule 806, MCM (1995), at A21-45. *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)(the public has a First Amendment right to attend criminal trials). Public trials are generally thought to provide greater assurance that procedural rights of the accused will be observed. *E.g.*, *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985), *cert. denied*, 474 U.S. 1062 (1986)(public scrutiny of courts-martial promotes fairness of the process).

⁴⁴⁵Record of Trial, at 1; NEWCOMB, at 192.

⁴⁴⁶ Captain D. C. White joined the defense as a fourth counsel and technical adviser on December 13. Record of Trial, at 263.

⁴⁴⁷Record of Trial, at 257 ("His nation is not of Christian belief."), 258 ("There are numerous questions as to the veracity of the Japanese as a race.").

⁴⁴⁸Record of Trial, at 257-58 (applicable law on the competence of witnesses and alternative oaths to be administered to them), 264. *See* NAVAL COURTS AND BOARDS 163, ¶ 243 (1937)(presumption in favor of the

testimony was probably more favorable to Captain McVay than prejudicial, because he stated that zigzagging would not have made an appreciable difference in his attack.⁴⁴⁹ The prosecution rested on 13 December. The defense opened on 14 December, called eighteen witnesses (including Captain McVay), and introduced one exhibit. A seasoned submarine commander called as an expert by the defense, Captain Glynn Donaho, testified that zigzagging would not defeat a proficient submarine attack. Captain Donaho admitted on cross-examination, however, that zigzagging did make targeting more difficult and could increase the chance of evading torpedoes after they had been launched. The defense rested on 18 December. Both sides made closing arguments and the court retired to deliberate.

The court found Captain McVay guilty of Charge I, through negligence suffering a vessel to be hazarded, and not guilty of Charge II, culpable inefficiency. After a brief sentencing hearing, at which the defense introduced Captain McVay's outstanding record of service, the Court sentenced him to lose 100 lineal numbers in his temporary grade of Captain and 100 lineal numbers in his permanent grade of Commander.⁴⁵⁰ The members of the Court joined unanimously in recommending that the reviewing authority exercise clemency, in view of Captain McVay's outstanding previous record. In accordance with ordinary post-trial procedures, the Judge Advocate General reviewed the record of trial and determined that the proceedings, findings and sentence were legal. The Chief of Naval Personnel and Admiral King recommended that the Secretary remit the sentence and restore Captain McVay to duty. On February 20, 1946, Secretary Forrestal approved the proceedings, findings and sentence, but he ordered that the sentence be remitted in its entirety and that Captain McVay be returned to duty.

Reassigned as Chief of Staff for Commander, Eighth Naval District, New Orleans, Captain McVay served in that capacity until he retired with 30 years of service on June 30, 1949. He was

competency of witnesses; burden of proof of incompetency is on the objecting party; matters in objection that do not establish incompetency of a witness may still affect his credibility; in preference to complete exclusion of witnesses, the court as factfinder should hear testimony and decide what credibility and weight it deserves). On the authoritativeness of the rules of evidence in Naval Courts and Boards, see NAVAL COURTS AND BOARDS 2, 130 (1937)(endorsed as authoritative by President Franklin D. Roosevelt, Mar. 5, 1937)("No statute lays down the rules of evidence to govern naval courts-martial and the decisions of the department on such a question are the highest authority for a naval court-martial to follow."). The general rule of liberally allowing testimony and leaving issues of competence to the jury parallels civil practice. See, e.g., Fed. R. Evid. 601 (providing that "Every person is competent to be a witness except as otherwise provided in these rules."). See Fed. R. Evid. 601 (Advisory Committee's note). The Advisory Committee states that "this general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article," noting that issues of witness competency go to weight because "[a] witness wholly without capacity is difficult to imagine". Capacity to testify as a witness is not an issue of race, religion or alienage, but of physical or mental capacity to observe and communicate information.

⁴⁴⁹But Hashimoto's testimony also indicated that visibility was sufficiently good for him to track *Indianapolis* visually for over 27 minutes from the time of his first sighting at an approximate range of 10,000 meters until he launched torpedoes at a range of approximately 1500 meters. Record of Trial, at 267-69 (ranges and time), 275 (radar was not used because visibility was good), 276 (continuous periscope observation). Cf. HELM, at 207.

⁴⁵⁰Loss of lineal numbers places an officer lower in the order of seniority among officers of the same grade and could delay eligibility to participate in the selection process for promotion to the next grade.

placed on the retired list in the grade of Rear Admiral. Rear Admiral McVay committed suicide on June 6, 1968, leaving no suicide note or other explanation.

The Bertolet Letter

Recent inquiries from Representatives Floyd Spence and Timothy Holden enclosed an unsigned letter from "Leon J. Bertolet," indicating that he was a surviving crew member of *Indianapolis*.⁴⁵¹ The letter from Mr. Bertolet stated numerous specific grievances with the treatment of Captain McVay. The letter stated that Captain McVay had been convicted of "dereliction of duty" and had been reduced in rank. The *Uniform Code of Military Justice* first introduced the offense of "dereliction of duty" in 1950.⁴⁵² Captain McVay's court-martial convicted him of suffering a vessel to be hazarded, and did not reduce him in rank but sentenced him to lose numbers, a sentence never imposed. Mr. Bertolet's letter also attributed Captain McVay's suicide to the Navy's use of him as a "scapegoat." Critics of the McVay court-martial have made this allegation before have never presented any evidence to support it. It is equally possible that Captain McVay succumbed to his own sense of personal responsibility for the *Indianapolis* tragedy, or that he was distressed over some completely unrelated issue. The letter also states that crew members of *Indianapolis* have petitioned Congress to have Captain McVay's rank restored. Not only was Captain McVay never reduced in rank, but he was retired as a Rear Admiral. Finally, Mr. Bertolet's letter alleged that Congress's failure to act on requests from "we survivors"⁴⁵³ is attributable to shame over *Indianapolis's* connection to the atomic bombing of Japan. This allegation appears to have been raised for the first time in Mr. Bertolet's letter.

Appropriateness of the Navy's Disposition of Captain McVay's Case

Congressman Jacobs' letter raises broader issues of the propriety and legality of the Navy's disposition of Captain McVay's case. Orion Pictures has purchased the film rights to Dan Kurzman's novel, *Fatal Voyage*, and more broad-based inquiries can be expected if the film is completed and released.⁴⁵⁴ Popular accounts of Captain McVay's court-martial and the decision-making process that led to the referral of charges do not reflect understanding of applicable law, the uniqueness of command accountability and the discretion of courts-martial convening

⁴⁵¹The surname "Bertolet" does not appear in *Indianapolis's* final sailing list of July 30, 1945 (HELM, at 213-243; KURZMAN, at 287-300), nor in the list of survivors (NEWCOMB, at 285-294; KURZMAN, at 287-300). The surname "Bertolet" does not appear in the official crew lists in Exhibit 20 of the Court of Inquiry. Mr. Bertolet must have served aboard *Indianapolis* at some time before her final voyage.

⁴⁵²The comparable offenses that existed under the *Articles for the Government of the Navy* were "neglect of duty" and "culpable inefficiency in the performance of duty." *Supra*, p. 37 nn.150-51.

⁴⁵³*See supra*, note 451.

⁴⁵⁴*E.g.*, Bonnie Britton, *Film May Clear Reputation of Warship Captain*, INDIANAPOLIS STAR, Aug. 3, 1995, at C01; *Orion Pictures Looks Forward to Making "Fatal Voyage"*, BUSINESS WIRE, Aug. 1, 1995.

authorities in the military. An in-depth exposition of the unique military law applicable to Captain McVay's case has long been needed to demonstrate the legality and appropriateness of the Navy's disposition of charges against Captain McVay.

The Doctrine of Command Accountability

Kurzman's research revealed that it had occurred to Captain McVay, an experienced naval officer, that he would be called to account for the sinking of *Indianapolis* as early as the moment he watched the ship disappear beneath the surface of the sea,⁴⁵⁵ an expectation he later repeated to the *New York Times*: "I was in command of the ship and I am responsible for its fate."⁴⁵⁶ As he stated when testifying at his court-martial, "I know I can not shirk the responsibility of command."⁴⁵⁷

The traditional scope of duties and accountability that attach to command at sea has no parallel in the military or civilian spheres. Navy Regulations in effect in 1945 provided that the commanding officer "is always responsible for the safe conduct of his ship."⁴⁵⁸ Current Navy Regulations have continued the tradition of strict command accountability:

The responsibility of the commanding officer for his or her command is absolute. . . . While the commanding officer may, at his or her discretion, . . . delegate authority to subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of continued responsibility for the safety, well-being and efficiency of the entire command.⁴⁵⁹

The doctrine of accountability holds that officers in command may be made to answer for failures within their commands, whether they were active participants in a mishap or not.⁴⁶⁰ The doctrine

⁴⁵⁵KURZMAN, at 92 ("[I]t would be much easier if I go down. I won't have to face what I know is coming after this.").

⁴⁵⁶KURZMAN, at 211; also quoted in LECH, at 161.

⁴⁵⁷Record of Trial, at 362.

⁴⁵⁸Navy Regulations, art 880(5), *quoted in* Record of Trial, at 372.

⁴⁵⁹Navy Regulations, art. 0802 (1990). *See* Navy Regulations, art. 182(6) (1920)(similarly absolute).

⁴⁶⁰*See, e.g.,* United States v. Day, 23 C.M.R. 651, 656-57 (N.B.R. 1957)(conviction of commanding officer for negligently hazarding a vessel affirmed, notwithstanding matters not reported to him by his subordinates, including their failure to post an anchor watch, failure to inform him of receipt of two weather messages, and failure to inform him of worsening of the weather). In accordance with Navy Regulations and "many years of custom and usage," "the responsibility of the commanding officer for his command is absolute . . ." *Id.*, at 657. In accordance with the traditional rule, the failure of Captain McVay's subordinates to brief him on the *Wild Hunter*/U.S.S. *Harris* radio traffic, to inform him of changes in the weather, or to commence zigzagging in accordance with fleet doctrine, would not be exculpatory for him as the commanding officer of *Indianapolis*. In

applies most emphatically to command at sea, and has been variously expressed in naval writings, for example:

The Department considers that the good of the Naval service requires the commanding officer of every Naval vessel to be held to very strict responsibility for the safety of the ship and its officers and men.⁴⁶¹

A vital element in the equipment of an officer for command is a complete appreciation on his part of his full responsibility for the safety of his ship at all times.⁴⁶²

As Senator Malcolm Wallop explained:

Th[e] principle of command responsibility is the bedrock upon which all military discipline rests. It is particularly prominent in the U.S. Navy, which holds the commander of a vessel accountable if his ship runs aground or collides with another ship, even if he is not on the bridge at the time.⁴⁶³

The doctrine of command accountability is most strictly applied to command at sea in recognition of the fact that naval vessels frequently operate independently, far from sources of assistance, in an environment made hostile by the elements or by enemies. Life at sea is surrounded by dangerous forces on the ship and around it. Mistakes and omissions can mean the death of all hands on board. The doctrine of command accountability inculcates vigilance, circumspection, independence, self-sufficiency, resourcefulness and diligent husbanding. It forces the commanding officer to turn every opportunity to his advantage, to ensure that his ship is in the optimum material condition possible, and that his subordinates are well-trained, disciplined and properly qualified to assume duties entrusted to them. No one is in a better position to ensure the safety of a ship than its commanding officer. He must take aggressive measures to ensure the adequacy of off-ship support and on-ship proficiency, and not be lulled into a sense of complacency based on confidence in others. A commanding officer operating under such a principle is more likely to achieve the ultimate goal that lies behind the accountability doctrine—maximum possible readiness and efficiency. No less should be expected when the object of command at sea on a ship-of-the-line is war. "The complete responsibility of a commanding officer for his command has always been one of the cornerstones of any naval service."⁴⁶⁴ Captain

the *Day* case, the Court specifically rejected the commanding officer's argument that he should not be held accountable for the errors of subordinate officers who had formal training, had sufficient experience to test their training, and had demonstrated ability to carry out their assigned duties.

⁴⁶¹NAVAL DIGEST, 1916, "Navigation," par. 16, at 410, *quoted in* United States v. MacLane, 32 C.M.R. 732, 735 (C.G.B.R. 1962), and referred to as a source for the underlying standards in the offense of hazarding a vessel in LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 265.

⁴⁶²Court-Martial Order 2, 1924, at 5, *quoted in* United States v. MacLane, 32 C.M.R. 732, 735 (C.G.B.R. 1962).

⁴⁶³Sen. Wallop ltr of 31 Jan 92 (to Mr. and Mrs. Edward Kimmel).

⁴⁶⁴United States v. Sievert, 29 C.M.R. 657, 668 (N.B.R. 1959).

McVay's routing instructions for the last voyage of *Indianapolis* cautioned that "Commanding Officers are at all times responsible for the safe navigation of their ships."⁴⁶⁵

While it is true that off-ship support activities should also be held to high standards, it would unacceptably dilute the principle of command accountability to allow commanding officers of warships to cite the collateral shortcomings of others as an excuse for their own, separate deficiencies. Accountability is not an all-or-nothing concept. Each commander is separately responsible for his own deficiencies, without regard to the culpability of others or the discretionary decisions made by the chain of command in deciding what measures to take in the wake of a multiple-fault disaster. The doctrine of command accountability, however, does not *require* that punishment be imposed for command defects; instead, it exposes a commander to the *risk* of punishment or administrative sanctions, based on the circumstances of the case and the discretion of his superiors. Sanctions available to superior commanders range from private censure through relief from command and nonjudicial punishment to referral of charges to a court-martial. Moreover, different superior officers have different disciplinary and enforcement policies, and they are afforded discretion by law to make distinctions among different cases based on the circumstances of each case.⁴⁶⁶ Captain McVay's comments upon his fate after the sinking of *Indianapolis* demonstrated that he well understood the culture of command at sea in the Navy.

Through Negligence Suffering a Vessel of the Navy to be Hazarded

Among the offenses triable by courts-martial are many unique "employment-related" failures alien to the civilian setting, such as disobedience of orders, dereliction of duty, and improper hazarding of a vessel.⁴⁶⁷ From the earliest days of our nation, criminal liability has

⁴⁶⁵Record of Trial, Exhibit 1.

⁴⁶⁶The principles of prosecutorial discretion and selective prosecution are discussed more fully below.

⁴⁶⁷*Parker v. Levy*, 417 U.S. 733, 749 (1974)(specifically listing UCMJ article 110, improper hazarding of a vessel, as an example of unique, military-only offenses); *United States v. Day*, 23 C.M.R. 651, 655 (N.B.R. 1957)(hazarding a vessel "is a statutory offense . . . peculiar only to the armed forces"). Quoting from numerous precedents, the Supreme Court in *Parker v. Levy* stated that the superficially vague standards expressed in many military-only offenses must be understood in light of unique customs and usages of the military:

[T]o maintain the discipline essential to perform its mission effectively, the military has developed what may not unfitly be called the customary military law or general usage of the military service Decisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to . . . seemingly imprecise standards [O]f questions not depending upon the construction of . . . statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.

417 U.S. 733, at 743-48 (citations omitted).

existed for one who negligently hazarded a vessel of the United States.⁴⁶⁸ The offense of negligently hazarding a vessel and the strict doctrine of accountability associated with command at sea are closely related. The doctrine of accountability defines the duties of a commanding officer, breach of which may lead to criminal liability for negligently hazarding his vessel. As stated in *United States v. MacLane*,⁴⁶⁹ a case involving conviction of a commanding officer for negligently hazarding a vessel,

It seems evident that the highest standards of performance of duty are demanded for the ship's safe operation; standards consonant with a full understanding of the substantial risks of loss of life and damage involved. The duty is to take all necessary precautions; to exercise due care and eternal vigilance. The criminal liability imposed is justified from the preventive point of view by the harmful conduct it seeks to deter.⁴⁷⁰

Captain McVay was convicted of an offense under Article 8(11) of *Articles for the Government of the Navy*, as follows:

Such punishment as a court-martial may adjudge may be inflicted upon any person in the Navy Who . . . , through inattention or negligence, suffers any vessel of the Navy to be . . . hazarded.

The complete list of "elements" that the government was required to prove to establish guilt of the hazarding offense at Captain McVay's trial was simple:

1. That Captain McVay was "in the Navy;"
2. That he had a duty (*i.e.*, safety of his ship/antisubmarine evasive maneuvering);
3. Which he failed to discharge in the manner expected of a reasonably prudent person in his circumstances;
4. Which failure proximately caused
5. A vessel of the Navy
6. To be hazarded.

⁴⁶⁸Article 42 of the first *Articles for the Government of the Navy*, 1 Stat. 713 (1799), included a hazarding offense substantially similar to the offenses currently included in the UCMJ.

⁴⁶⁹32 C.M.R. 732 (C.G.B.R. 1962).

⁴⁷⁰32 C.M.R., at 735.

Elements 1 and 5 were easily established. Captain McVay was "in the Navy" and *Indianapolis* was a "vessel of the Navy." The core of the McVay case was negligence in failing to zigzag, and whether this failure "hazarded" the ship.⁴⁷¹

Negligence

Elements 2 and 3 reflect the traditional legal formula for "negligence," a concept derived chiefly from the law of torts.⁴⁷² In the context of hazarding a vessel, negligence means "failure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances. No

⁴⁷¹See *United States v. MacLane*, 32 C.M.R. 732, 735 (C.G.B.R. 1962) ("The bare essentials for a conviction . . . are: proof that the vessel was hazarded, and proof that the hazarding was the proximate result of the accused's negligence."). A criminal trial is not a far-ranging investigation of a whole sequence of events; it is a focused inquiry into specific charges against a specific individual. The "elements" of a criminal offense, and of any affirmative defenses raised, define the scope of relevant evidence for trial. The government presents evidence that tends to establish the elements of the offense, or that tends to refute any affirmative defense raised by the accused. The accused presents evidence that tends to refute the existence of any of the elements of the offense, or that tends to establish an affirmative defense, such as alibi or entrapment. Evidence at Captain McVay's court-martial was properly limited to matters relevant to the specific charges referred for trial. See *Record of Trial*, at 68-69, 187; *NEWCOMB*, at 188, 204, 220. Critics of Captain McVay's court-martial have complained that the lead defense counsel, Captain John Cady, did not explore the fault of others for the sinking or delay in rescue, and he missed opportunities to elicit testimony about ULTRA intelligence. *E.g.*, *LECH*, at 196-198; *VON DOENHOFF*, at 8, 14. First, the collateral fault of others for such matters as the garbling of a message or the ambiguity of an order not to report the arrival of combatant vessels would have been irrelevant to the charges against Captain McVay. There is no defense recognized by criminal law that allows the accused to assert his innocence on the grounds that others were guilty of different misconduct. The concept of "comparative negligence" in civil law, by which degrees of fault are assigned to multiple actors in a single mishap, has no place in criminal law. Second, information about the sinking of U.S.S. *Underhill* and the ULTRA intelligence were irrelevant *precisely because* the government could not show that Captain McVay had reason to be aware of that information. The question on trial was whether Captain McVay was negligent, given what he did know or should have known, not whether he would have acted differently if he had been provided more information. The gist of Captain McVay's defense was that he made a reasonable mistake of fact about the existence of a submarine threat. To support such a defense, Captain Cady very adroitly elicited testimony from Captain Naquin that he considered the risk of enemy submarine activity to be "very slight," and from Captain Granum that he considered the risk to be "No more than a normal hazard that could be expected in wartime." *Record of Trial*, at 329-30, 332; *LECH*, at 195-97. This testimony tended to *negate* one of the key "elements" of the government's case—that Captain McVay should have known a sufficient submarine threat existed to warrant zigzagging in accordance with fleet doctrine. However, the court considered the information available to Captain McVay and found it sufficient to indicate the presence of a submarine threat. Critics of Captain McVay's court-martial have demonstrated profound misunderstanding of fundamental principles of criminal law, suggesting that everyone's responsibility for the whole *Indianapolis* tragedy should have been aired at Captain McVay's court-martial. The issues on trial under the hazarding charge at Captain McVay's court-martial were limited to the "elements" of the offense, listed above.

⁴⁷²*E.g.*, RESTATEMENT (SECOND) OF TORTS § 282 ("Negligence is conduct which falls below the standard established by law for the protection of others . . ."), § 283 (The standard of conduct expected is that of a "reasonable man under like circumstances."), § 284(b) (failure to perform an act for the protection of others "which the actor is under a duty to do") (1977).

person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order."⁴⁷³ Captain McVay's "duty" as the Commanding Officer of a warship, and whether he fell below the standards expected of a reasonably prudent commanding officer in executing that duty, were questions that could only be answered by application of the customs and usages of the Navy, as determined by the senior officer members of the court-martial.⁴⁷⁴

As discussed above, Captain McVay's duty as Commanding Officer was extremely demanding. Navy Regulations provided specifically that the commanding officer "is always responsible for the safe conduct of his ship."⁴⁷⁵ Compliance with fleet doctrine on anti-submarine evasive maneuvering was part of Captain McVay's duty to take precautions for the safety of his ship. Noncompliance with this doctrine was the specific breach of duty alleged in the charge before Captain McVay's court-martial. Because applicability of the fleet doctrine on evasive maneuvering was contingent upon visibility and the presence of a submarine threat, the prosecution opened a detailed factual inquiry into these matters at trial.⁴⁷⁶ Ultimately, the judgment of the court reflected a conclusion that the conditions of visibility and indications of a submarine threat were such that *Indianapolis* should have been zigzagging.

Under traditional concepts of negligence, an individual generally may not be held responsible for information that a reasonable person under similar circumstances would not have reason to possess.⁴⁷⁷ Whether *Indianapolis* should have been zigzagging depended on whether

⁴⁷³MCM (1995), ¶34c(3)(defining terms applicable to UCMJ article 110, improper hazarding of vessel). UCMJ article 110 derived from the hazarding offenses in the *Articles for the Government of the Navy*. LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 265; *United States v. Roach*, 26 M.J. 859 (C.G.C.M.R. 1988), *aff'd*, 29 M.J. 33 (C.M.A. 1989); *United States v. Adams*, 42 C.M.R. 911 (N.C.M.R. 1970).

⁴⁷⁴*See, e.g., United States v. MacLane*, 32 C.M.R. 732, 738 (C.G.B.R. 1961):

Since the officers of the service are the best judges of what constitutes due care and prudence aboard a vessel . . . , it is peculiarly within the province of the court-martial to say whether or not on the evidence adduced in the particular case before it, blameworthy and punishable negligence existed.

The civil courts show great deference to court-martial determinations based on customs and usages of the service. *See Parker v. Levy*, 417 U.S. 733, 743-48 (1974), quoted *supra*, note 467; *Carter v. McClaghry*, 183 U.S. 365, 401 (1902); *Smith v. Whitney*, 116 U.S. 167, 178 (1886)("[O]f questions . . . depending upon . . . unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.").

⁴⁷⁵Record of Trial, at 372 (quoting NAVREGS 880(5)).

⁴⁷⁶*See supra*, p. 88 nn.419-20 (visibility); *infra* pp. 102-03 n.479 (sub threat).

sufficient information was available to indicate the existence of a submarine threat. Although it is entirely consistent with traditional notions of the duties of a commanding officer to charge Captain McVay with knowledge of intelligence available on board his own ship, it would have been unreasonable to attribute knowledge of the ULTRA intelligence to him. Evidence that would have indicated the existence of a submarine threat was properly limited at Captain McVay's court-martial to those matters *which he had reason to know*. Evidence of the ULTRA intelligence would have been irrelevant and inadmissible.⁴⁷⁸ Ultimately, the court-martial found sufficient

⁴⁷⁷See, e.g., Model Penal Code § 2.02(2)(d)(Official Draft and Revised Comments 1985)(defining negligence in terms of circumstances knowable to the accused); BLACK'S LAW DICTIONARY 933 (5th ed. 1979)("Negligently"). The definition of negligence applicable to improper hazarding of a vessel included consideration of the unique circumstances of the accused. NAVAL COURTS AND BOARDS 133, ¶ 153 (1937)("The degree of care and caution to avoid mischief required to save from criminal responsibility . . . is that which a man of ordinary prudence would have exercised *under like circumstances*." (emphasis added)). The same individualized, circumstantial standard still applies. MCM (1995), ¶34c.(3)(defining terms applicable to UCMJ article 110, improper hazarding of vessel).

⁴⁷⁸Failure to provide Captain McVay ULTRA intelligence, or a sanitized summary of it, might indicate that others shared some measure of fault for the ultimate fate of *Indianapolis*, but the untried fault of others would not have been exculpatory for Captain McVay under the charges brought against him. A court-martial, like any criminal trial, is not a trial of an *incident* but of specific charges brought against an *individual*. The potential contributory fault of others in the *Indianapolis* tragedy was not on trial at Captain McVay's court-martial. The only possible purpose for introducing ULTRA evidence in defense would have been to urge the members of the court-martial to "punish" the Navy for not court-martialing others by acquitting Captain McVay—manifestly contrary to their duty to try the specific charges before them, based on evidence relevant to those charges.

It is often true that in a single course of events many separate offenses by many actors can be identified. The law does not excuse some actors for their own, separate offenses even when the greater offenses of others go unpunished. For example, in multiple perpetrator criminal cases, the acquittal or non-prosecution of principal offenders does not entitle accessories to acquittal or the dismissal of charges based on their own, separate conduct. *Standefor v. United States*, 447 U.S. 10, 14-26 (1980)(discussing the prevailing rule in the states, adopted by federal legislation as early as 1909); 18 U.S.C.S. § 2 (1997); *United States v. Sievert*, 29 C.M.R. 657, 664-65 (N.B.R. 1959)(Commanding officer's acquittal held inadmissible and irrelevant in separate trial of navigator for hazarding a vessel arising from the same incident—"[t]he . . . acquittal of another accused for the same offense . . . cannot be set up as a defense, even in those cases where the parties are jointly charged with the crime An accused when placed upon trial for the commission of an offense must be convicted or acquitted on evidence or lack of it showing *his* guilt or innocence of the *particular offense* alleged in the charge against *him*." (emphasis added)). See, e.g., WAYNE R. LAFAVE AND AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW (1972), at 517 ("[I]t is now generally accepted that an accomplice may be convicted notwithstanding the fact that the principal in the first degree has been acquitted or has not yet been tried."). Cf. 10 U.S.C.S. § 877 (1997)(UCMJ art. 77). The multiple perpetrator severability rule has established that even minor actors may not avoid liability for their own conduct by citing the greater fault of others in the *same offense*. The concept of "separate fault" is even stronger where separate offenses are involved. The following examples might help to explain the irrelevance to Captain McVay's hazarding offense of the failure to provide ULTRA intelligence:

1. The driver of an automobile is traveling at twice the speed limit when a maintenance worker suddenly emerges in the middle of the road from a manhole cover and is killed by the driver's automobile. Other maintenance workers who were responsible for placing caution signs and barricades along the road had failed to do so. The driver could still be fined for speeding or reckless driving without regard to investigation or prosecution of any of the parties for negligent homicide. Whether the workers responsible for placing the signs and barricades were tried for their dereliction or not would have no bearing on a speeding or reckless driving charge. Even if the negligent workers were tried and convicted for failure to place barricades, proof of their offenses would not be exculpatory with respect to a speeding or reckless driving charge.

evidence of a submarine threat in the information available to Captain McVay, as cataloged by the Judge Advocate in his closing argument.⁴⁷⁹ The independent committee of attorneys that reviewed Captain McVay's court-martial for Senator Lugar examined the Record of Trial and found that sufficient evidence existed to support the judgment of the court:

There was sufficient evidence to conclude that Captain McVay knew or should have known of a hostile submarine presence in the immediate vicinity of the course of the *Indianapolis* as it was proceeding to the Philippine Islands.

There was sufficient evidence to conclude that Captain McVay was not in compliance with the naval regulation regarding "zigzagging" given the weather conditions on the night of the incident.

The remaining issue is whether Captain McVay's failure to discharge his duty caused *Indianapolis* to be hazarded.

Hazarding by Failure to Zigzag

Whether a ship is hazarded or "at risk" at a particular time under particular circumstances is a question of external fact unrelated to individual culpability.⁴⁸⁰ A ship is "hazarded" if it is placed at *risk*, without regard to ultimate harm.⁴⁸¹ Whether *Indianapolis* was "hazarded" by

2. The commanding officer of a submarine is conning the submarine at a speed and depth that places the submarine outside the peacetime "safe-operating envelope" (SOE) prescribed by submarine operational doctrine when the submarine strikes an uncharted submerged mountain and is seriously damaged. Information is later discovered that the Defense Mapping Agency had hydrographic survey information indicating the presence of the mountain and negligently failed to include the mountain on charts provided to the submarine. The commanding officer can still be convicted of negligently hazarding his vessel without regard to the collateral fault of cartographers, based solely on failure to observe the SOE. The offense of hazarding a vessel is complete if the vessel was negligently placed *at risk of harm*, without regard to any specific harm that resulted.

⁴⁷⁹See Record of Trial, at 370: the Intelligence Annex to the Routing Instructions; the *Wild Hunter*/U.S.S. *Harris* sub-prosecution reports that Captain McVay admitted were received on board *Indianapolis* on 28 July; the Quartermaster's testimony that Captain McVay's night orders included mention of a submarine in a position that *Indianapolis* would cross by morning on July 30 (Record of Trial, at 187).

⁴⁸⁰See MCM (1995), ¶34c(1).

⁴⁸¹"The element of risk is the center around which the law of hazarding revolves." *United States v. Cunningham*, No. 84-3469, slip op. (N.M.C.M.R. July 31, 1985); *United States v. Buckroth*, 12 M.J. 697, 700 (N.M.C.M.R. 1981), *aff'd in part, rev'd in part on other grounds*, 13 M.J. 108 (C.M.A. 1982). To hazard a vessel is "to put the vessel in danger of loss or injury." *United States v. Krewson*, No. 86-1004, slip op. (N.M.C.M.R. June 16, 1986). The offense of hazarding a vessel "is thus unusual in criminal law in that it makes a person punishable for merely risking (hazarding) an item of property quite irrespective of resultant damage." *United States v. MacLane*, 32 C.M.R. 732, 735 (C.G.B.R. 1962). See also *United States v. Tusing*, 12 M.J. 608 (N.M.C.M.R. 1981), *aff'd in part, rev'd in part on other grounds*, 13 M.J. 98 (C.M.A. 1982); *United States v. Adams*, 42 C.M.R. 911 (N.M.C.M.R. 1970). The law has long been settled that "'hazard' means to put in danger of loss or injury." MCM

failure to zigzag, then, is not a question of ultimate blame for her sinking.⁴⁸² Based on evidence of submarine activity in the vicinity of route "Peddie," including I-58, the members of Captain McVay's court-martial found that *Indianapolis* had been placed at risk, or hazarded (element 6). *Indianapolis* was hazarded before I-58 detected her, and would have been hazarded if I-58 had

(1995), ¶34f(2); NAVAL COURTS AND BOARDS § 69 (1937). See Record of Trial, at 371 (proper definition of "hazarded" applied at Captain McVay's court-martial).

⁴⁸²While it was and is permissible to include ultimate harm to a vessel in a hazarding specification (see NAVAL COURTS AND BOARDS, Specimen Charges and Specifications, at 125-126; MCM (1995), ¶34f(2)), and proof of such ultimate harm "is conclusive evidence that the vessel was hazarded" (MCM (1995), ¶34c(1)), the gravamen of any hazarding offense is that the accused placed the vessel at *risk* of harm, even if no harm ultimately resulted. The hazarding charge against Captain McVay did not include consummation by the sinking of *Indianapolis*. The government's burden was to demonstrate that failure to zigzag placed *Indianapolis* at risk with respect to *any* possible submarine contacts. Captain McVay's court-martial conviction did not attribute fault to him for the sinking of *Indianapolis*, the deaths of crew members, or delay in the rescue of survivors. The Judge Advocate General has stated this fact clearly before. See Navy JAG ltr JAG:I:JBP:rs:imc of 15 May 46 (RADM Colclough to Senator Tom Connally):

The conviction of Captain McVay by general court-martial held 3 December 1945 of Charge I, THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE HAZARDED, . . . did not establish that he was responsible for the loss of approximately eight hundred men who failed to survive the sinking of the INDIANAPOLIS.

As his special assistant, Edward Hidalgo, advised Secretary Forrestal, "the technical charge on which McVay was convicted was that of 'hazarding' his ship—not causing its loss or sinking." KURZMAN, at 249. The *Lugar Study* highlighted the distinction between Captain McVay's conviction and responsibility for the loss of *Indianapolis*:

It is important to note . . . that Captain McVay was not charged with taking or failing to take actions which resulted directly in the sinking of U.S.S. *Indianapolis*. While this may seem a "technical" distinction, it was an important one for our committee to keep in mind during the course of our review of the proceedings. Our committee also would submit that this is an important distinction to consider for those who review this report and choose to continue to discuss this incident.

Because of the sequence of events, to wit: the sinking of the U.S.S. *Indianapolis*, the instigation of the court martial proceedings, and the conviction of Captain McVay on a violation of a naval regulation that resulted in the "hazarding" of the ship, it is reasonable to assume that many consider Captain McVay to have been convicted of dereliction of duty that directly resulted in or caused the sinking of the U.S.S. *Indianapolis*. This is not the case. The nature of the charges, the penalty imposed, and the ultimate disposition of this case clearly indicate otherwise.

Lugar Study, at 4. The distinction between "hazarding" a vessel and causing ultimate harm to it is not a "technical" distinction; it is a traditional, professional distinction of considerable consequence. The law of hazarding is intentionally prophylactic; it reflects such great solicitude for the safety of naval vessels that serious criminal sanctions, including death, are available to punish those whose conduct exposes naval vessels to mere inchoate risk. The deterrent message of the law is that "not only shall you not cause harm to a naval vessel; you shall not so much as expose her to the risk of harm." This policy would also apply to operationally inappropriate risks taken in combat. Failing to appreciate the aspect of *risk* in a hazarding offense, even well-known naval historians continue to perpetuate the error that "a court-martial convicted McVay of being responsible for this unnecessary tragedy." E.g., ROBERT W. LOVE, JR., HISTORY OF THE UNITED STATES NAVY 1942-1991 (1992), at 276.

never detected her. This perpetrator-neutral fact could have been the result of any number of contributing causes, but the only question of causation before the court was whether failure to zigzag was, legally, the proximate cause of hazarding (element 5).⁴⁸³ The question was *not* whether failure to zigzag was the proximate cause of *Indianapolis's* sinking, but whether failure to zigzag placed *Indianapolis* at risk.

Whether failure to zigzag placed *Indianapolis* at risk depends on whether zigzagging contributes to the survivability of a ship with respect to submarine attack. The testimony of Commander Hashimoto and Captain Donaho was equivocal on this question. Captain McVay's counsel attempted to show that zigzagging would not effectively *preempt* submarine attack. The *absolute effectiveness* of zigzagging, however, was not the issue. The real issue was whether failure to zigzag increased the likelihood or *risk* of effective submarine attack. Standing fleet doctrine on zigzagging⁴⁸⁴ reflected the institutional judgment of the Navy that zigzagging did contribute to ship safety in submarine waters—a powerful element of proof.

The Value of Zigzagging

Whether proficient submarine commanders can still effectively prosecute a zigzagging surface target does not mean that zigzagging is useless. Zigzagging makes submarine targeting of a surface vessel more difficult, and a zigzagging target can evade torpedoes once they are fired.⁴⁸⁵ Zigzagging increases the chances of survival. A Commanding Officer should take every possible tactical measure to increase the opportunity for his ship and crew to survive. Even if the ship must inevitably go down, then it should only be after available tactical measures to avoid such a fate have been employed.

In a submarine/ship engagement with torpedoes, there are three moving objects: the submarine, the ship, and the torpedoes. All three move relatively to each other. Timing is of the essence. Torpedoes used during World War II were not steerable and did not employ acoustic seekers. Torpedoes were launched on a fixed course at a fixed speed⁴⁸⁶ and had to impact a moving target along a straight line. To employ such torpedoes successfully, first a submarine had

⁴⁸³See *United States v. Day*, 23 C.M.R. 651, 656-57 (N.B.R. 1957)(discussing proximate cause in hazarding a vessel: "The requirement of proximate cause is satisfied if the accused's act or omission "was one of several factors which all together caused the final result [T]he inquiry is not directed toward discovering the cause . . . but whether the accused's conduct was a cause There are innumerable cause factors in every case We are only interested in determining what part the conduct of the accused played in producing the result In the case of plural, concurrent or intervening causes, in relation to the determination of proximate cause, we consider the 'substantial factor' rule as providing the best yardstick—the act of the accused must have been a substantial factor in producing" the result.").

⁴⁸⁴The doctrine is quoted *supra*, at pp. 88-89.

⁴⁸⁵See Record of Trial, at 337, 342-43.

⁴⁸⁶There were only a few preset speeds which could be selected, limiting the choices of ranges and bearings to the target when a torpedo could be launched to intercept it.

to determine the course, speed and range of the surface target; then it had to maneuver into an appropriate attack position. Finally, the course and speed settings for the torpedoes had to be determined to ensure that they would physically impact the target vessel along its track. Making the necessary calculations was not as simple as it might seem. If the target vessel was not maintaining a steady course and speed, the targeting problem could be significantly complicated.

As an illustration of the effect of zigzagging on a relative motion/intercept calculation, Figure 2 depicts a submarine at the center of the "maneuvering board." The submarine first detects a target (track depicted in blue) bearing 090 at 10,000 yards.⁴⁸⁷ The submarine observes the target for ten minutes and correctly determines its course and speed to be 262 at 17 knots. The submarine launches a torpedo (depicted in red) at 48 knots, course 110, at time 11, to intercept the target at time 13. One minute before the torpedo was launched at time 11, the submarine did not observe that the target began a 20° zig to port (or starboard) at time 10 (alternative zig tracks depicted in green). It is evident from the maneuvering board that the torpedo would miss the target. Even if a fan of six torpedoes were launched, with a spread of 2° between the center torpedoes, and 3° between the others (covering 14°),⁴⁸⁸ at time 13 the torpedoes would cross the original firing solution track of the target along true bearings from the submarine ranging from 103° to 117°. All torpedoes would miss the target, regardless of the direction of the zig at time 10.⁴⁸⁹

The illustration in Figure 2 assumes that the submarine has calculated the course, speed and range of the target perfectly. Using night-time visual observations alone, such perfection would have been unlikely.⁴⁹⁰ Visual calculation of the range to a target requires an estimation of its mast-head height, which depends on correct identification of the class of the ship, which is also difficult to do at night. Hashimoto had ship silhouettes available to assist him with this

⁴⁸⁷Hashimoto first observed *Indianapolis* bearing 090, at an estimated range of 10,000 meters.

⁴⁸⁸See Record of Trial, at 269 (testimony of Hashimoto).

⁴⁸⁹See Record of Trial, at 338 (the Judge Advocate cross-examining Captain Donaho):

39. Q. . . . assuming . . . you haven't gotten a new setup while she is on this course, this forty-five away from you, and then she changed, say, twenty more to the left and she makes seventeen knots all this time, and you are submerged; what effect would these changes have on the accuracy of your torpedo fire?

A. I would probably miss.

40. Q. Pardon?

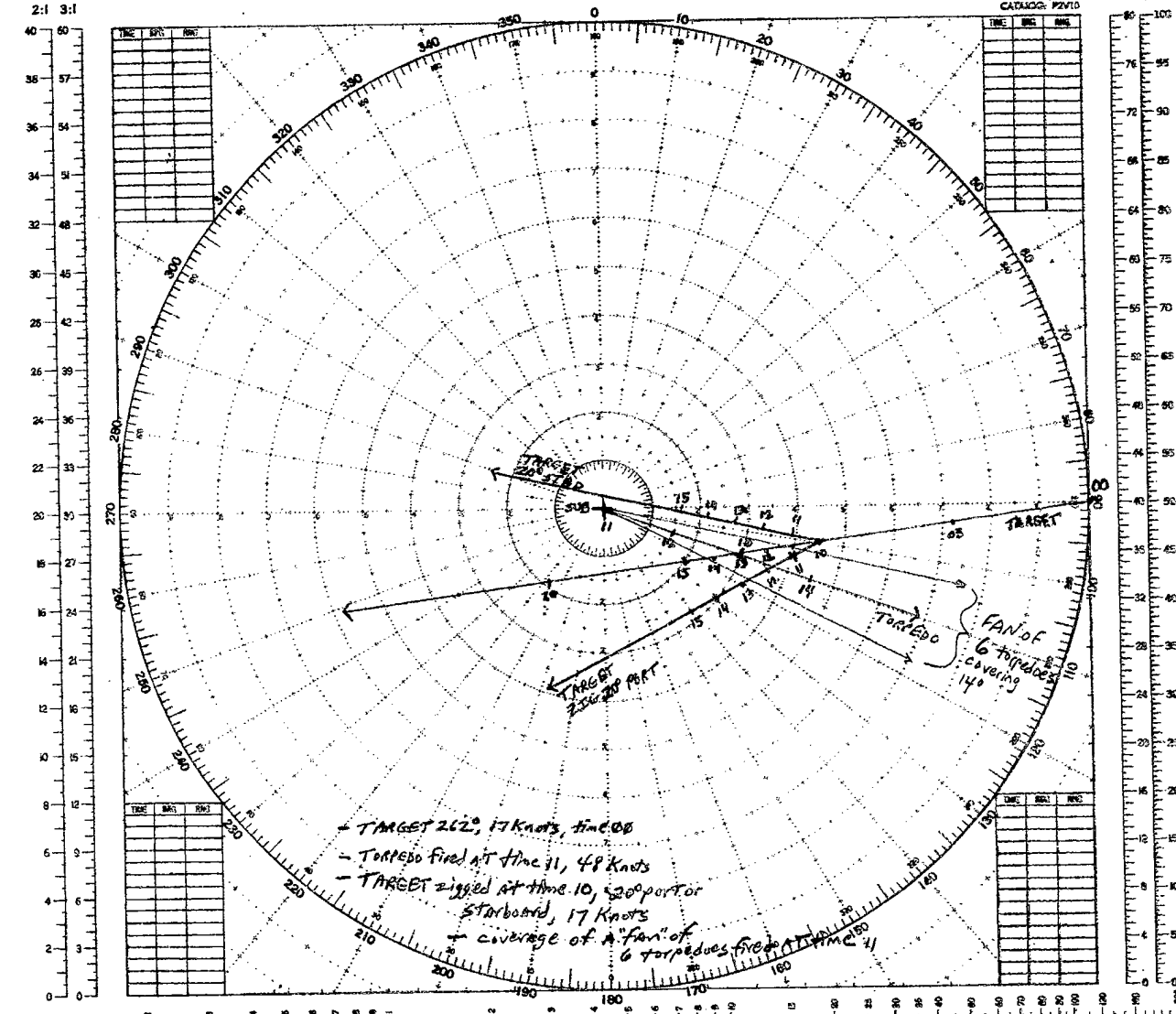
A. I would probably miss.

⁴⁹⁰See Record of Trial, at 260 (Hashimoto believed *Indianapolis* was on course 260 at 12 knots, vice 262 at approximately 17 knots), 338 (Captain Donaho: "We fire spreads to take into consideration errors in course and errors in speed.").

MANEUVERING BOARD

SCALES
2:1 3:1

SCALES
4:1 5:1



LOGARITHMIC TIME, SPEED, AND DISTANCE SCALE

Use single scale throughout

Use of miles with logarithmic time, speed, and distance scale

TO FIND SPEED, place any point of division on diameter line and second point on speed in miles. Without changing spread of divider or right-angle relationship of point, place first point on time, second point will then indicate speed in knots.

Actual distance and speed units can be used in the same way as relative units.

USE OF 3-SCALE HOMOGRAPH

Given any two corresponding quantities, solve for third by laying ruler through points on proper scale and read intersection on third scale.

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Figure 2

determination, but he believed *Indianapolis* was an Idaho-class battleship.⁴⁹¹ For the sake of convenience, the illustration also assumes that the submarine is stationary, which would make calculation of a targeting solution much easier. Adding a course and speed for the submarine would make a relative motion/intercept calculation even more complicated. Removing these simplifying assumptions made for the sake of illustration, zigzagging could be even more effective in complicating or evading a submarine attack. An infinite number of hypothetical submarine/ship engagements could be constructed along *Indianapolis*'s track, in which zigzagging might make a decisive difference. The finding that *Indianapolis* was placed at risk did not depend on any particular ship/submarine positions.

In the illustration, several things could happen at time 13 when the hypothetical fan of torpedoes misses the zigzagging target. The ship could immediately turn towards the line-of-bearing from which the torpedoes were launched, presenting a "narrow aspect" to the submarine, minimizing the surface area of the ship that could be targeted. The ship could drop depth charges or accelerate to flank speed and clear the attack datum immediately.⁴⁹² The ship could transmit a message reporting the attack and her exact latitude and longitude. Radar operators and lookouts alerted after a near-miss torpedo attack could search for and possibly detect a periscope. Location of the periscope could facilitate a counterattack or even more effective evasive maneuvering. If the submarine suspected that it had been detected, it might crash-dive to avoid counterattack, abandoning its reattack. Finally, if the visibility were intermittently good and poor, as clouds intermittently blocked the moon (as was the case on the night of July 29, 1945), the submarine's ability to target the ship visually might be impeded by poor visibility after an initial failed attack. If a World War II era submarine were able to reposition and launch a successful reattack, which is not at all certain, given the slow maximum speeds of Japanese diesel submarines, at least the ship might have fought a tactically honorable engagement. There might have been more time to send a message reporting the attack. Whatever advantage zigzagging might have provided in *any number* of hypothetical submarine engagements on the night of July 29, 1945, the crew of *Indianapolis* was denied that advantage, contrary, as the court found, to standing fleet doctrine. Captain McVay himself obviously attributed special significance to the fact that *Indianapolis* was not zigzagging; he insisted on reporting that fact from *Ringness* immediately upon being rescued.

Critics of Captain McVay's court-martial have argued that failure to zigzag was not an appropriate basis for his conviction by

(1) impugning the tactical efficacy of zigzag maneuvering as an anti-submarine measure in general,⁴⁹³

⁴⁹¹Record of Trial, at 271 (Hashimoto did not use the book of silhouettes before firing); *supra*, p. 90 n.428 (report of sinking a battleship).

⁴⁹²Hashimoto testified that his submarine could only make 7 knots submerged and 12 knots on the surface (where it would be vulnerable to counterattack). On the other hand, *Indianapolis* had just broken the world speed record from San Francisco to Pearl Harbor (LECH, at 6; KURZMAN, at 36 (averaging 29.5 knots)), and "no submarine could touch her at 24 knots" (NEWCOMB, at 42).

(2) by arguing that zigzagging would not have defeated the attack on *Indianapolis* under the specific facts of the engagement, and

(3) by arguing supersession of standing naval doctrine by pointing out that Captain McVay's routing instructions from CinCPac left zigzagging to his discretion.

Consideration of applicable legal principles and the professional naval aspects of the case, however, reveal the weakness of these arguments.

First, commanding officers of naval vessels choose to deviate from standing operational doctrine⁴⁹⁴ or instructions at their own peril. No one is expected to commit suicide in obedience to doctrine—but the choice to deviate must be the right one when it is made. Individual officers are encouraged to contribute to the evolution of effective naval doctrine, and naval exercises are designed specifically to serve this purpose, but operational defiance of doctrine deemed obsolete by individual commanders is not part of the disciplined culture of the Navy. Military discipline would crumble under the individualistic theory of adherence to tactical doctrine suggested by McVay's proponents. Furthermore, arguments against the tactical efficacy of zigzagging are factually incorrect as a matter of relative motion science. Zigzagging was considerably more effective as a submarine evasion measure before the era of acoustic warfare and steerable, homing torpedoes, but it is still considered to be sufficiently effective to warrant continued inclusion in current Navy anti-submarine doctrine.⁴⁹⁵ Second, arguing that I-58 would have sunk the ship whether it was zigzagging or not presupposes that Captain McVay was held responsible for the sinking of the ship by not zigzagging. Whether zigzagging would have defeated submarine I-58's targeting of *Indianapolis* was not the issue at Captain McVay's court-martial. The members of the court-martial found Captain McVay responsible for placing the vessel at risk by not zigzagging, a finding applicable to *any* possible submarine threat along the track to Leyte.⁴⁹⁶

⁴⁹³See, e.g., LECH, at 33, 172; KURZMAN, at 55, NEWCOMB, at 58.

⁴⁹⁴The applicable doctrine on zigzagging was introduced as Exhibit 4 at Captain McVay's court-martial.

⁴⁹⁵See ALLIED TACTICAL PUBLICATION (ATP) 1(C), Vol. I, at 2-23 to 2-25; ATP 3(A)(Navy), "Anti-submarine Evasive Steering," par. 101a, at 1-1 (The two primary objectives of evasive steering are to make it more difficult for a submarine to reach a position of attack and to deny the submarine a valid fire control solution.), par. 105, at 1-2 (Doctrine for evasive steering applies to independent ships in areas where there is a submarine threat.); NAVAL WARFARE PUBLICATION (NWP) 61, "Anti-Submarine Warfare," par. 2.1.2.6.2 ("Evasion"). Current doctrine does not limit zigzagging to periods of good visibility, in view of modern acoustic methods of submarine anti-ship warfare.

⁴⁹⁶Members of the public often disagree with jury fact-finding and emphasize particular evidence that tends to prove or disprove a particular fact. The experienced senior officer members of McVay's court-martial found that not zigzagging caused *Indianapolis* to be hazarded. Both sides presented evidence on this issue at trial. The prevailing practice in courts throughout the United States allows the fact-finding province of a jury, or members of a court-martial, to be disturbed only upon the strongest showing of the inadequacy of evidence. For example, Rule for Courts-Martial (RCM) 917(d), MANUAL FOR COURTS-MARTIAL (MCM)(1995), provides that "[a] motion for a finding of not guilty shall be granted only in the absence of *some evidence* which, together with all reasonable inferences and applicable presumptions, could reasonably *tend* to establish every essential element of an offense

Finally, the fact that the CinCPac routing instructions left zigzagging to the discretion of Captain McVay did not relieve him from potential liability for the negligent exercise of his discretion. No commanding officer of a naval vessel could ever be freed by such an instruction from the criminally-enforceable professional standards relating to his duty, military law enacted by Congress, and the customs and traditions of the naval service. Civilian critics of the court-martial have read CinCPac's instruction as an absolute license to zigzag or not, as if it relieved Captain McVay of the duty to engage in sound operational practices to ensure the safety of his ship. Certainly, Captain McVay could not have been found guilty of an orders violation under Article 4 of the *Articles for the Government of the Navy* (disobedience of a lawful order of a superior officer), because he was not specifically ordered to zigzag, but he could most certainly be found guilty of culpable inefficiency or negligence in the manner in which he chose to exercise his discretion.⁴⁹⁷

The attorneys commissioned by Senator Lugar to study the McVay case stated their "unanimous opinion that the determination that Captain McVay was guilty of violating a naval regulation that resulted in the hazarding of his ship was . . . supported by the weight of the evidence."⁴⁹⁸ In particular, the *Lugar Study* examined the Record of Trial and concluded:

There was sufficient evidence to conclude that the actions of Captain McVay and his immediate subordinates, who were subject to his command, resulted in the hazarding of the *Indianapolis*.

Prosecutorial Discretion

The decision to investigate or prosecute in individual cases, and what particular charges to bring, has traditionally been the province of broad prosecutorial discretion.⁴⁹⁹ Prosecutors acting in their official capacity are "absolutely privileged" to initiate criminal proceedings.⁵⁰⁰

charged. The evidence shall be viewed in the light *most favorable to the prosecution*, without an evaluation of the credibility of witnesses." (emphasis added). See also *Jackson v. Virginia*, 443 U.S. 307 (1979).

⁴⁹⁷See MCM (1995), ¶34c(3)(definitions applicable to improper hazarding of a vessel)("No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order.").

⁴⁹⁸*Lugar Study*, at 5.

⁴⁹⁹*E.g.*, *Borden-Kircher v. Hayes*, 434 U.S. 357, 364 (1978)(Public officials making decisions to prosecute exercise broad discretion.); JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT § 1.09 (1985), at 11 ("[P]rosecutors enjoy broad discretionary powers to investigate and/or decline to investigate allegations of crime. For all intents and purposes, their discretion is unbridled."); *Id.*, § 1.14, at 14 ("[T]he prosecutor enjoys extremely broad discretion in the decision to indict or initiate criminal proceedings against a suspected wrongdoer and, to a large extent, that decision is unassailable.").

⁵⁰⁰RESTATEMENT (SECOND) OF TORTS § 656 (1977).

Prosecutorial decisions in the context of the federal government are generally entrusted to Executive Branch discretion.⁵⁰¹ Many factors influence the exercise of such discretion, including the interest of the public.⁵⁰² The great degree of discretion that exists in deciding the disposition of cases involving offenses committed by military officers is but one aspect of a total milieu of authority and discretion within which disciplinary personnel decisions are made in the military. The law of prosecutorial discretion applicable in the military is similar to the law applicable in the civilian setting, with the key difference that the commander⁵⁰³ is also a court-martial convening authority, and it is he who is endowed with the broad discretionary powers of the prosecutor under military law.⁵⁰⁴

No one has a right to compel the prosecution of others,⁵⁰⁵ nor is failure to prosecute others generally recognized as a defense. In both the military and civilian settings, "selective prosecution" is unlawful only if it is founded upon a constitutionally impermissible basis, such as race, sex, alienage, or retaliation for the exercise of First Amendment or other constitutional rights.⁵⁰⁶ Mere failure to prosecute others does not establish the defense of selective prosecution.⁵⁰⁷ To sustain a defense of "selective prosecution," the accused must show that

⁵⁰¹E.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)(The decision to indict or not "has long been regarded as the special province of the Executive Branch"); 10 Op. Off. Legal Counsel 68, 72-73 (1986)("[N]either the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the Executive Branch by directing the executive to prosecute particular individuals" (citations omitted)). See *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457-59 (1869)(Decision to prosecute or abandon a case on behalf of the United States is discretionary.). See also *Morrison v. Olson*, 487 U.S. 654, 706 (1988)(Scalia, J., dissenting)("Governmental investigation and prosecution of crimes is a quintessentially executive function.").

⁵⁰²Prosecutors, in exercising their discretion, are often responsive to public opinion. When an aroused public demands prosecution in a particular case, a more vigorous prosecution is likely. Newman F. Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770, 792-93 (1933).

⁵⁰³Including the Commander in Chief and his deputies, the secretaries. 10 U.S.C.S. § 822(a) (1997)(UCMJ art. 22(a)). The law in 1945 also specified that the President and the Secretaries of the Navy and of War were convening authorities. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 38 (1930), reproduced in NAVAL COURTS AND BOARDS 465, ¶ B-40 (1937)("General courts-martial may be convened . . . by the President, the Secretary of the Navy . . ."); LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 17 (1942).

⁵⁰⁴E.g., NAVAL COURTS AND BOARDS 5, ¶ 13 (1937)(convening authority discretion to determine what charges will be referred to a court-martial).

⁵⁰⁵E.g., *Schulke v. United States*, 544 F.2d 453, 455 (10th Cir. 1976)(Appellant's attempt to force courts-martial of other service members rejected—decisions of military authorities whether to refer court-martial charges are not subject to judicial review).

⁵⁰⁶*Wayte v. United States*, 470 U.S. 598 (1984); *United States v. Hagen*, 25 M.J. 78, 83 (C.M.A. 1987), cert. denied, 484 U.S. 1060 (1988); *United States v. Means*, 10 M.J. 162, 165-66 (C.M.A. 1981). The Supreme Court has found the equal protection principle applicable to federal action through the Due Process clause of the Fifth Amendment. On the limited number of classifications that have been held or assumed to be prohibited in the exercise of prosecutorial discretion, see WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 13.4 (2d ed. 1992), at 633.

persons *similarly situated* were not prosecuted, and that the prosecuting authority intentionally based his decision on a constitutionally⁵⁰⁸ impermissible classification.⁵⁰⁹ Moreover, the defense must be raised at trial or it is waived,⁵¹⁰ and the defendant "bears the heavy burden" of establishing a *prima facie* case.⁵¹¹ Selective prosecution claims are seldom successful, even in death penalty cases involving lopsided racial statistics.⁵¹² It is inconceivable that a legally sufficient case of selective prosecution could be made with respect to Captain McVay. As the only commanding officer of *Indianapolis* in late July 1945, he was not "similarly situated" with respect to anyone, and the charges brought against him are not similar to charges that might have been brought against anyone else who might have contributed to the *Indianapolis* tragedy. Finally, no evidence exists of intentional discrimination on a *constitutionally* impermissible basis, such as race or ethnicity. The general rule with respect to prosecutorial discretion is well-settled—prosecution authorities have "broad discretion to initiate and conduct criminal prosecutions," and "the decision to prosecute is particularly ill-suited to judicial review."⁵¹³

Unique aspects of criminal law in the military provide even greater support for the exercise of discretion by court-martial convening authorities. As the U.S. Supreme Court has stated, "The military constitutes a specialized community governed by a separate discipline from that of the civilian."⁵¹⁴ "[T]he special relationships that define military life have supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon

⁵⁰⁷*E.g.*, *United States v. Maplewood Poultry Co.*, 320 F. Supp. 1395 (D.Me. 1970); *United States v. Rickenbacker*, 309 F.2d 462 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963). *See also* *Oyler v. Boyles*, 368 U.S. 448 (1962). In *Oyler*, the Court held that the exercise of reasonable selectivity in enforcement does not deny equal protection to those prosecuted, declaring that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." This is so, the Court stated, even where statistics may imply a policy of selective enforcement. The Court added that the defendant must prove that his prosecution was "deliberately based" on constitutionally impermissible discrimination. 368 U.S., at 456.

⁵⁰⁸*Wayte v. United States*, 470 U.S., at 608 (Selective prosecution claims are judged according to Equal Protection Clause standards.); *Willhauck v. Halpin*, 953 F.2d 689, 711 (1st Cir. 1991)(Claim of selective prosecution must show that defendant's equal protection rights were violated.).

⁵⁰⁹*See, e.g.*, *Government of the Virgin Islands v. Harrigan*, 791 F.2d 34, 36 (3d Cir. 1986); *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 932 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983), *reh. denied*, 460 U.S. 1056 (1983); *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974); *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985), *cert denied*, 474 U.S. 1005 (1985).

⁵¹⁰*E.g.*, *United States v. El-Amin*, 38 M.J. 563, 564 (A.F.C.M.R. 1993).

⁵¹¹*E.g.*, *United States v. Union Nacional de Trabajadores*, 576 F.2d 388, 395 (1st Cir. 1978).

⁵¹²*E.g.*, *McClesky v. Kemp*, 481 U.S. 279, 292-97 (1987).

⁵¹³*See* Katherine Lowe, *Project, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1991-1992*, 81 GEO. L.J. 853, 1029-32 (1993)(citing *Wayte v. United States*, 470 U.S. 598, 607 (1985) and *Newton v. Town of Rumery*, 480 U.S. 386, 396 (1987)).

⁵¹⁴*Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

military authority might have."⁵¹⁵ In cases where military decisions affecting service members have been challenged, courts have shown great deference to the unique circumstances of military service.⁵¹⁶

Central among the unique features of military life is the authority of senior officials in the chain of command to form judgments on the adequacy of the performance of subordinate officers in command. Where the law allows superior officials discretion to decide the disposition of cases involving perceived defects in an officer's performance, many different factors may influence the decision, including the experience of the officer, his or her past performance, seniority, specific noteworthy achievements, and such external factors as assessment of the impact on others of the officer's unsatisfactory performance. The threshold standard of evidentiary weight for referring charges to a court-martial is low. If a convening authority finds reasonable grounds to believe that a particular individual has committed an offense, he may refer charges against that individual to a court-martial.⁵¹⁷ The decision to refer particular charges to a court-martial is highly

⁵¹⁵Chappell v. Wallace, 462 U.S. 296, 305 (1983)(quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187 (1962)).

⁵¹⁶E.g., Chappell v. Wallace, 462 U.S. 296, 303 (1983)(Military personnel have no Constitutional tort remedy against actions taken by their superiors.); United States v. Stanley, 483 U.S. 669 (1987)(In a case involving nonconsensual, experimental administration of LSD, the Court held that service members have no cause of action under the Constitution for injuries suffered incident to service.); Feres v. United States, 340 U.S. 135, 146 (1950)("[T]he Government is not liable under the *Federal Tort Claims Act* for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953); Martin v. Mott, 25 U.S. (12 Wheat) 19 (1827)(Military decisions of superior officers are immune from civil suits by subordinates.); Murphy v. United States, 993 F.2d 871, 873 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994)("There are thousands of routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or jurisdiction of the court to wrestle with."). Courts traditionally have been reluctant to intervene in any matter which "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." Shearer v. United States, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional military decisions as to the composition, training, equipping and control of a military force are essentially professional judgments" Gilligan v. Morgan, 413 U.S. 1, 10 (1983).

⁵¹⁷The current *Manual for Courts-Martial* states the minimal standard for referral of charges as follows:

If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

RCM 601(d)(1), MCM (1995). Generally accepted ethical standards for prosecution authorities reflect a similarly low threshold for the initiation of a prosecution. A.B.A., Model Rules of Professional Conduct, Rule 3.8(a) (1995)("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."). The Supreme Court has articulated a similar standard: "so long as the prosecutor has probable cause to believe that the accused committed an offense . . . , the decision whether or not to

discretionary with individual military convening authorities. This type of discretion afforded convening authorities in the military inheres throughout the structure of the *Uniform Code of Military Justice*, and its predecessors, the *Articles of War* and *Articles for the Government of the Navy*. The courts have found the system of military justice consistent with the Constitution.⁵¹⁸

Military law contains many criminal offenses related to obedience of authority and job performance, concepts totally alien in civilian employment. In *Parker v. Levy*, the Supreme Court further observed that there are military cases "beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties."⁵¹⁹ In accordance with the practice of the federal courts, such matters are generally left to the judgment of military authorities. It would be difficult to imagine matters more uniquely related to military customs and usage than the duties incident to command at sea and the standards associated with the safe navigation of naval vessels.

As the *Lugar Study* concluded, "The decision to bring court-martial charges against Captain McVay was a decision appropriately within the scope of prosecutorial discretion."⁵²⁰

prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). An action for the tort of malicious prosecution will not lie unless criminal charges were brought without probable cause and the plaintiff was acquitted. See W. PAGE KEETON ET AL, PROSSER & KEETON ON THE LAW OF TORTS § 119 (5th ed. 1984), at 871; RESTATEMENT (SECOND) OF TORTS § 658 (1977)("[C]riminal proceedings must have terminated in favor of the accused."). See also *Buckley v. Fitzsimmons*, 509 U.S. 259, 286 (1993)(Kennedy, J., concurring in part and dissenting in part)(cause of action for malicious prosecution depends on lack of probable cause to indict). "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'" *Brinegar v. United States*, 338 U.S. 160, 175 (1949), quoting *Carroll v. United States*, 267 U.S. 132, 161 (1925). The *Articles for the Government of the Navy* did not state a standard of evidentiary sufficiency for the referral of charges to a court-martial. Notwithstanding this fact, the Judge Advocate General carefully reviewed the evidence and advised Secretary Forrestal that it supported only the two proposed charges, and not other charges that had been considered previously. JAG:bee memo for SECNAV of 29 Nov 45 (applying a "*prima facie* case" standard, a standard higher than "probable cause"). See LECH, at 181-82 (suggesting that trial on the zigzagging charge was an open-and-shut case, "over before it began," at this pre-referral deliberation phase—more than sufficient to meet the standard of "probable cause.").

⁵¹⁸Court-martial convening authorities play a decisive role throughout the military justice process, including decision-making under the following rules: RCM 303 (preliminary inquiry); RCMs 304(b), 305 (pretrial restraint and confinement); RCM 306 (initial disposition of offenses); RCM 401 (disposition of charges); RCM 404 (actions available to special court-martial convening authority); RCM 407 (actions available to general court-martial convening authority); RCMs 502, 503 (selection and detailing of members of courts-martial); RCM 601 (referral of charges); RCM 702(b) (ordering depositions); RCM 704 (grants of immunity); RCM 705 (negotiating and entering pretrial agreements on behalf of the government); RCM 1101 (temporary deferment of sentence to confinement); RCM 1107 (action on findings and sentence); MCM (1995). See *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857)(The separate and distinct system of military justice is constitutional.); *Ex parte Reed*, 100 U.S. 13, 20 (1879)("The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court.").

⁵¹⁹417 U.S. 733, at 748 (quoting *Swaim v. United States*, 28 Ct. Cl. 173, 228 (1893)).

⁵²⁰*Lugar Study*, at 6.

Stated less tentatively, the decision to refer charges against Captain McVay was one committed by law to the discretion of the Secretary of the Navy.⁵²¹

Reviewability of Captain McVay's Conviction

Captain McVay was tried and convicted under the *Articles for the Government of the Navy*.⁵²² The *Articles for the Government of the Navy* did not provide for appeals.⁵²³ Power to reverse a Navy conviction remained with the convening authority, who could be reversed only by the Secretary of the Navy or the President.⁵²⁴ Accordingly, once Secretary Forrester took final action on the court-martial and the President did not intervene, the judgment was final. Captain McVay was not entitled to collateral review pursuant to a writ of habeas corpus because he was not sentenced to confinement.⁵²⁵ He was released and restored to duty. Nor was Captain McVay entitled to review in the Court of Claims because the sentence, as approved by the Secretary, did not affect his pay.⁵²⁶ Congress has "no power whatever" to revise or reverse a court-martial

⁵²¹See ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 38; NAVAL COURTS AND BOARDS 5, ¶ 13 (1937)(convening authority discretion to determine what charges will be referred to a court-martial).

⁵²²The *Articles for the Government of the Navy* was not a Navy regulation, but an enactment of Congress (Act of April 2, 1918, 40 Stat. 501), pursuant to Constitutional authority (U.S. Const. art. 1, § 8; amend. 5).

⁵²³The Supreme Court has consistently held that the Constitution does not require that systems of criminal justice provide for appellate review of convictions. See, e.g., *McKane v. Dunston*, 153 U.S. 684 (1894); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 690-91 (1986). Until the 1984 Military Justice Amendments provided for review of courts-martial by the Supreme Court by writ of certiorari (see 10 U.S.C.S. § 867a (1997)), the Court held that federal courts had no jurisdiction to hear direct appeals or petitions from courts-martial. E.g., *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863)(writ of certiorari from courts-martial not provided for in the Constitution nor in the statutes); *In re Vidal*, 179 U.S. 126 (1900)(same). Cf. *In re Yamashita*, 327 U.S. 1, 13-14 (1946)("Correction of their [i.e., courts-martial] errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.").

⁵²⁴ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 54; NAVAL COURTS AND BOARDS 243, ¶ 471 (1937)(Convening authority of a court-martial is the reviewing authority.); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950)(Correction of any errors in a court-martial "is for the military authorities which are alone authorized to review its decision."); *Carter v. McClaughry*, 183 U.S. 365, 385 (1902)(Court-martial convening authority was "the reviewing authority, and the court of last resort."); *Swaim v. United States*, 28 Ct. Cl. 173, 217 (1893), *aff'd* 165 U.S. 553 (1897)("The proceedings of . . . military tribunals can not be reviewed in the civil courts. No writ of error will lie to bring up the rulings of a court-martial. Even in the trial of a capital offense the various steps by which the end is reached can not be made the subject of judicial review. The only tribunal that can pass upon alleged errors and mistakes is the commanding officer . . .").

⁵²⁵See, e.g., *United States v. Augenblick*, 393 U.S. 348, 350 (1969)(Habeas corpus "not available to respondent . . . because he was . . . not imprisoned . . ."); 28 U.S.C.S. § 2241 (1997) (Writ of habeas corpus not available unless petitioner is "in custody"); 16 FED. PROC., L. ED. §§ 41:12 to 41:34 (Supp. 1995)(meaning of "in custody").

⁵²⁶Back-pay suits under 28 U.S.C.S. § 1491 have long been an alternative method of collaterally attacking a court-martial judgment. See *United States v. Augenblick*, 393 U.S. 348, 349 n.2, 350-52 (1969); *Cooper v. United*

judgment.⁵²⁷ In 1983 Congress limited the power of the military boards for correction of records in court-martial cases to corrections that reflect clemency and actions taken by reviewing authorities.⁵²⁸ The Board for Correction of Naval Records, therefore, does not have authority to set aside a court-martial conviction.⁵²⁹ At this point in time, the only power possessed by military authorities over a final judgment fifty years old is the power of the Secretary of the Navy to remit or suspend any unexecuted part of Captain McVay's sentence—but Secretary Forrestal has already remitted the sentence in its entirety.⁵³⁰ As provided by law, then, the judgment of conviction is "final and conclusive" and is "binding upon all departments, courts, agencies, and officers of the United States, subject only to . . . the authority of the President."⁵³¹ The President has constitutional power to grant pardons,⁵³² but in the post-conviction setting, "a pardon is in no sense an overturning of a judgment of conviction . . . ; it is an executive action that mitigates or sets aside punishment for a crime."⁵³³ Captain McVay received no punishment that may be set aside by pardon; moreover, the Pardon Attorney's office at the Department of Justice related that applications for posthumous pardons are not accepted under current Executive policy.⁵³⁴ The President, however, has unlimited discretion to grant pardons and may make an exception from

States, 20 Ct. Cl. 70 (1990). The limited methods by which courts-martial may be collaterally reviewed in federal courts are discussed in *Brown v. United States*, 365 F. Supp. 328 (E.D. Pa. 1973).

⁵²⁷See, e.g., CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 142 (1921).

⁵²⁸10 U.S.C.S. § 1552(f) (1997).

⁵²⁹See *Cooper v. Marsh*, 807 F.2d 988 (Fed. Cir. 1986); *Stokes v. Orr*, 628 F. Supp. 1085 (D.Kan. 1985).

⁵³⁰10 U.S.C.S. § 876 (1997).

⁵³¹*Id.*

⁵³²U.S. Const. art 2, § 2(1)(The President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

⁵³³*Nixon v. United States*, 506 U.S. 224, 232 (1993)(case involving former federal district court judge Walter Nixon). See also *Burdick v. United States*, 236 U.S. 79, 94 (1915)(A pardon "carries an imputation of guilt; acceptance [of a pardon] a confession of it."); *Carlesi v. New York*, 233 U.S. 51 (1914)(Pardon does not erase previous conviction.). See generally Henry Weihofen, *The Effect of Pardon*, 88 U. PA. L. REV. 177 (1939); Samuel Williston, *Does Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 648 n.7 (federal cases taking narrow view of effect of pardon). According to Chief Justice Marshall, "A pardon is an act of grace . . . which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833)(emphasis added). Justice Field in *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867) took a broader view of the effect of a pardon: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." This broad view of the pardon power is today, however, restricted to pardons granted before conviction. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984* 187 (Randall W. Bland et al, eds., 5th ed. 1984).

⁵³⁴Phoncon CDR R. Scott (NJAG 10.2)/Keith Waters (DOJ, Pardon Attorney's Office) of 3 Jun 96. See Office of the Pardon Attorney, 28 C.F.R. §§ 0.35 to 0.36 (1997); Executive Clemency, 28 C.F.R. §§ 1.1 to 1.2 (1997).

his own policy as he sees fit.⁵³⁵ Given the current legal understanding of the limited effects of a post-conviction pardon, however, Captain McVay's conviction is not subject to legal reversal by any recognized means. A Presidential pardon granted as an exception to policy would be chiefly ceremonial.⁵³⁶

Conclusion

Others share fault in the *Indianapolis* tragedy, and history has recorded it that way. In fact, the popular literature and editorial commentary on the subject has been remarkably one-sided in highlighting the failings of others and trivializing the role of Captain McVay. Nowhere in such writings is there manifested an appreciation of the special role of the commanding officer of a naval vessel and the awesome responsibility entrusted to him. Uninformed popular literature has portrayed Captain McVay as a hapless victim—a role he never chose to play. The strict principle of accountability inherent in command at sea predates the United States and transcends all of the actors in the tragedy of *Indianapolis*. Each case involving loss or damage to a vessel is different. Sometimes punitive measures are invoked, and sometimes not, but the risk of personal ruin for a commanding officer is always present.

Captain McVay was tried for a professional shortcoming by a panel of his peers and was awarded a commensurate professional sentence, loss of numbers, later remitted in view of his outstanding professional record. There was no reversible error in this process. It is too late now to call to account others who might have failed with respect to *Indianapolis*, but that is not an appropriate reason to reverse the conviction of Captain McVay. The most appropriate "remedy," if one is due, is to acknowledge other factors that contributed to the *Indianapolis* tragedy. Admiral Nimitz's staff issued an ambiguous order not to report the arrival of combat ships; the Navy had no procedure in place to monitor the non-arrival of warships; warships were routinely diverted by the operational chain of command without informing port officials; personnel in the Port Director's office at Leyte did not take the initiative to inquire into the delay in *Indianapolis*'s arrival; communications personnel on CTG 95.7's staff decoded a message incorrectly, and communications personnel at Okinawa failed to provide a sailing report to CTF 95; the CinCPac staff failed to follow-up on an unconfirmed sinking report; personnel at COMMARIANAS and Commander, Philippine Sea Frontier, did not monitor the scheduled "chop" of *Indianapolis* between their regional sea commands; COMMARIANAS could have but did not reroute *Indianapolis* in view of the *Wild Hunter* reports;⁵³⁷ ULTRA intelligence was not disseminated to

⁵³⁵E.g., 20 Op. Att'y Gen. 330 (1892)(Pardon may be granted before or after conviction, and absolutely or upon conditions. "The ground for the exercise of the power is wholly within the discretion of the Executive.").

⁵³⁶Cf. *Knote v. United States*, 95 U.S. 149, 153-54 (1877)(pardon confers no right to compensation).

⁵³⁷Arguments that the *Wild Hunter* reports should have caused COMMARIANAS to reroute *Indianapolis* cut both ways—if these reports indicated that the risk of submarine activity was so great that *Indianapolis* should have been rerouted, then the same reports should also have indicated to *Indianapolis* that the risk of submarine activity was great enough to warrant evasive maneuvering.

the level where it might have been most useful;⁵³⁸ ASW-capable escorts were being employed in a hotter combat zone to the north; standard transit routes were used instead of varying them to confuse the enemy; *Indianapolis* was a "soft" ship and had to sail routinely in a compromised condition of watertight integrity; and survival equipment was outdated or poorly designed. Fleet Admiral King saw to it that every one of these issues was thoroughly explored, apart from the culpability of Captain McVay, to ensure that no valuable "lessons-learned" were lost.⁵³⁹

A "scapegoat" is "one who is blamed or punished for the sins of others."⁵⁴⁰ The Navy has never attributed blame to Captain McVay for any of the above-listed contributory causes of the *Indianapolis* tragedy. He was tried on charges that arose uniquely from matters within his control as Commanding Officer of *Indianapolis*. The Navy's press release of February 23, 1946, reporting the results of the court-martial and the action on sentence by the Secretary, was accurate in every respect, including the clear statement that Captain McVay "was neither charged with, nor tried for, losing the *Indianapolis*."⁵⁴¹ In another press release of the same date, the Navy provided a lengthy "Narrative of the Circumstances of the Loss of the USS *Indianapolis*,"⁵⁴² which clearly stated the contributory fault of others.⁵⁴³ Anyone can speculate that there were surreptitious reasons for court-martialing Captain McVay for his part while others were not punished for theirs. Official records reflect careful consideration of fault on the part of all personnel involved. One effect of the disciplinary decisions finally made was re-emphasis of the strict doctrine of accountability associated with command at sea.

Captain McVay has an important place in naval history, and not as a "scapegoat." He was highly decorated during the war in the Pacific, but he is also a *memento mori* to all commanding officers that they are responsible for vigilance to the limits of human capacity for the safety of their crews. All commanding officers should reflect upon the *Indianapolis* and the hard lesson that Captain McVay teaches—those who labor against the ocean in obedience and trust of

⁵³⁸Even if the ULTRA intelligence had been provided, it is not at all clear that the Officer of the Deck on *Indianapolis* would have resumed zigzagging at night when conditions of visibility began to improve. Would the week-old ULTRA information have been more convincing than the real-time reports of submarine prosecution along *Indianapolis*'s track transmitted by *Wild Hunter* and the *Harris* hunter-killer group?

⁵³⁹These records are included with endorsements on the Court of Inquiry and in the IG's supplemental investigation.

⁵⁴⁰O.E.D. (1971). See *Lev.* 6:16-20.

⁵⁴¹Reproduced in LECH, at 268-69. In fact, the committee that studied the McVay case for Senator Lugar concluded that "There was evidence to support the conclusion that the sinking of the *Indianapolis* would have resulted, irrespective of Captain McVay's compliance with the naval regulation regarding 'zigzagging.'" *Lugar Study*, at 9.

⁵⁴²Reproduced in LECH, at 254-67.

⁵⁴³Except for the matter of ULTRA, which was still highly classified for national security reasons unrelated to Captain McVay. The classification of ULTRA was not within the authority of the Department of the Navy.

authority must know that their captain has neglected no measure to preserve them. That is the traditional bargain of command at sea. Without the responsibility of it, there would be no cause for unquestioning faith in it.⁵⁴⁴

IV. Closing Comments

Advocates for Kimmel, Short and McVay have attempted to obtain official remedies on the basis of emotional appeals, frequently disguised in the language of legal grievance. Officials who took administrative or disciplinary action in the three cases did not exceed their lawful authority in any of the matters about which the commanders' advocates have complained. The fundamental nature of Executive power is discretionary decision-making, not adjudication. The President and his appointed deputies had constitutional or statutory discretion to make each decision that affected the three commanders: to relieve them, to investigate them, to withhold recommendations for advancement, and to refer charges to a court-martial, or, in the case of Kimmel and Short, not to do so. When the law provides one party a power over the other, and deprives the party subject to that power of any avenue of redress or appeal, it has already resolved the dispute between them. To be an officer in the military is to submit to such a regime of authority. Generations may argue about "fairness" or "justice," whatever those terms mean to a particular individual at a particular time, but there can be no argument about the legitimacy of the exercise of powers that are left to the conscience of the empowered. The very exercise of such powers is law in action.

Most surprising about the Kimmel, Short and McVay cases is the august roster of flag and general officers who have rallied to their cause. Whether a sense of shared vulnerability binds these officers together, or post-retirement rebellion against the principle of civil control of the military, the implication is the same. Civilian control is threatened by organized insistence upon professional military judgment in lieu of what might appear to be the capricious perspective of policy and politics. Moreover, the morale and trust of junior officers and enlisted personnel, themselves subject to authority that seems at times capricious, can be eroded by organized flag

⁵⁴⁴In the American Navy, the principle of accountability for the safety of one's crew

... derives directly from our longstanding tradition of the citizen-soldier. The Founding Fathers explicitly rejected the European tradition of a professional officer caste that put its own stature and survival above that of troops forcibly drawn from the peasantry. Instead, in our democracy the military leader's authority over his troops was linked to a parallel responsibility to them as fellow citizens.

Accountability is a severe standard: The commander is held responsible for everything that occurs under his command. Traditionally, the only escape clause was "an act of God," an incident that no prudent commander could reasonably have foreseen. And "reasonably" was tied to the requirement to be "forehanded"—a sailor's term dictating that even unlikely contingencies must be thought through and prepared for. The penalties of accountable failure can be drastic: command and career cut short, sometimes by court-martial.

Capt. Larry Seaquist, USN, *Iron Principle of Accountability Was Lost in Iowa Probe*, NAVY TIMES, Dec. 9, 1991, at 31.

and general officer efforts to rescue their own fallen comrades from laws that have claimed thousands of junior personnel who will never be the subject of hearings in the Senate.

The military cases cited in this paper are not academic writings. They are the real records of individual plaintiffs and defendants who lost in their struggle to escape the ill consequences of the exercise of authority. The quest for official remedies for Kimmel, Short and McVay is not a quest to correct what was done to them unlawfully, but a quest for exception from the same laws that have claimed so many others. Because these three commanders are infamous is no reason to treat them differently than the thousands of others who have long since been forgotten.